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No. 82-

IN THE

Supreme Court of the United States

OCTOBER 1982 TERM

BORDEN, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should a company that has lawfully obtained a dominant position in the market be prohibited from responding to local competition by gradually lowering its prices in an attempt to meet competition and reduce its loss of market share?

2. Should a company that sells a premium-priced product which has gained consumer acceptance and a dominant position in the market be prohibited from engaging in vigorous price competition, where the company never sells the product below cost?

3. Should a company that is forced by competition to lower prices or lose sales be deemed to have "monopoly power" because it has a large percentage share of an artificial and narrowly-defined product market and because consumers are willing to pay more for its brand-name product?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 674 F.2d 498 (6th Cir. 1982). The opinions of the Federal Trade Commission and of its Administrative Law Judge are reported at 92 F.T.C. 669 (1978). All of the opinions are reproduced in the separately-bound Appendix submitted herewith.[1]

[1] The following abbreviations are used in citing the opinions below and the corresponding page numbers in the Appendix:

CA: the Court of Appeals opinions (pages CA-1a through CA-38a).

FTC: the FTC opinions (pages FTC-39a through FTC-94a).

ALJ: the Administrative Law Judge's opinion (pages ALJ-94a through ALJ-200a).

References to portions of the record, other than the opinions below, are to the Joint Appendix ("JA") filed in the Court of Appeals.

JURISDICTION

The Court of Appeals entered judgment on February 24, 1982. Borden filed a timely petition for rehearing and suggestion for rehearing *en banc* on March 10, 1982, which was denied on April 12, 1982. By Order of this Court dated June 29, 1982, Borden's time for filing a Petition for a Writ of Certiorari was extended to August 25, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The FTC commenced this proceeding under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), which provides:

> "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

The FTC, as well as the Sixth Circuit (CA-10a-11a; FTC-42a n.4), treated the case as one brought under Section 2 of the Sherman Act, 15 U.S.C. § 2, which provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ."

STATEMENT OF THE CASE

Petitioner seeks review of a divided decision of the Sixth Circuit Court of Appeals, affirming a decision of the Federal Trade Commission, which held that Borden had unlawfully monopolized the market for processed lemon juice by "selectively" reducing its prices "in geographic markets where Borden faced competition from Golden Crown Citrus Corporation. . . ." (CA-la; FTC-57a). The Sixth Circuit

affirmed an order that prohibits Borden from lowering its prices in local markets where it is losing business to price-cutting competitors and that requires Borden to charge essentially uniform national prices. (FTC-93a-94a).

The Underlying Facts

Borden, Inc.[2] is the manufacturer of "ReaLemon" brand reconstituted lemon juice. "ReaLemon was the first firm to develop and market a bottled lemon juice," and, as a result, "it naturally had a monopoly in the market at the outset."[3] (FTC-53a). During the 1970's, however, ReaLemon's market position was successfully challenged, first regionally by Golden Crown (which was acquired by The Seven-Up Company in 1974), then nationally by Minute Maid (which is owned by The Coca-Cola Company). (FTC-62a; JA-412).

The FTC's complaint focused on the 1970-1974 period and Borden's competition with Golden Crown. During that period, Golden Crown rapidly expanded from its original Chicago-area base to most other areas of the country. (ALJ-141a-142a). Its "method of expansion was to sell its product to retailers at prices well below those of ReaLemon." (CA-3a). Those low prices were made possible in part by

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[2] Pursuant to Supreme Court Rule 28.1, Borden states that it has no parent company. Its domestic subsidiaries and affiliates (other than wholly owned subsidiaries) are: Bayaman Can Corp., Coco Lopez Mfg. Corp., Coco Lopez of New York, Inc., Illinois Nitrogen Corp., Industrias La Famosa, Inc., John Robert Powers Attractions, Inc., Monochem, Inc., Productos Damita, Inc., and The Viking Engraving Corp.

[3] The FTC defined the relevant product market as "processed lemon juice," excluding fresh lemons from the market definition even though the juice of fresh lemons can be and is substituted for every use of reconstituted lemon juice. (FTC-49a). In this narrowly-defined market, annual sales are only $25 million. (ALJ-95a).

Golden Crown's practice of "routinely" adulterating its product with cheaper ingredients.[4] Golden Crown's "extremely low or below cost prices" (ALJ-178a) undersold not only ReaLemon, but also ReaLemon's lower-priced competitors.[5] As a result, several local bottlers of lemon juice lost large parts of their business and were driven out of a number of markets. (FTC-59a; ALJ-142a; JA-85).

When "the significant price differential between Golden Crown and ReaLemon began to make inroads on [its] sales" (CA-3a), Borden reacted with "progressively more vigorous price . . . responses to Golden Crown, running over a period of four years," which did not "reach [their] peak until . . . [ReaLemon's] national share had fallen by 8 percentage points and Golden Crown's had risen by 13. . . ." (FTC-75a n.4, 89a n.14, Clanton, C., and Pitofsky, C., concurring). Throughout this period, ReaLemon's prices were always higher than Golden Crown's, generally by "10 to 21 cents per bottle," and ReaLemon did not even *begin* to reduce its prices until Golden Crown started charging *half* the price of ReaLemon. (FTC-62a; see JA-666, 784, 817-35, 1117-19). Moreover, ReaLemon's prices were always above its average variable cost for the product. (ALJ-176a-177a; FTC-68a). Golden Crown was thus able to capture 15% of the national market (as defined by the FTC) and a much higher share of

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[4] "Golden Crown's reconstituted lemon juice was adulterated with citric acid and sugar. . . . The evidence proves beyond question that Golden Crown routinely, at least during significant production periods, manufactured its reconstituted lemon juice using substantial amounts of citric acid and sugar. . . . There was also no disclosure, it may be noted, on the Golden Crown label of the presence of sugar and citric acid." (ALJ-176a n.3).

[5] Most of ReaLemon's competitors charged lower prices for their processed lemon juice, although Minute Maid and VitaPakt charged higher prices. (JA-39-40, 426).

many local markets. (ALJ-127a; JA-606, 1086). Another competitor, Minute Maid, was able to expand even more dramatically; during six months of 1976, its share jumped from 5.6% to 18.2%. (JA-1190-91). In the meantime, ReaLemon's share of sales fell rapidly:

Year	ReaLemon's Share of Sales[6]	
	By Dollars	By Gallons
1969	88.9%	88.7%
1970	87.1%	86.1%
1971	86.1%	84.2%
1972	82.9%	80.2%
1973	79.9%	77.4%
1974	77.8%	75.3%
1976	65.4%	69.9%

[6] ALJ-127a; FTC-66a n.40*; JA-1190-91.

The Proceedings Below

The FTC commenced this proceeding in July 1974 and, following a trial before an administrative law judge, issued its decision in November 1978. Chairman Pertschuk's majority opinion concluded (1) that in spite of the evidence of competition between fresh lemons and bottled lemon juice, "processed lemon juice" was an appropriate product market (FTC-49a); (2) that Borden possessed "monopoly power" in this market because of its large percentage share and because ReaLemon, "one of the greatest brand names in the history of the supermarket," was "able to command a substantial price premium" relative to most other brands (FTC-50a-51a); and (3) that Borden had violated Section 2 of the Sherman Act because it had maintained its market share through price reductions that were "not economically inevitable." (FTC-55a). Even though Borden's prices were never below cost and were always profitable (FTC-89a), the FTC held that Borden's prices were "unreasonably low" because they forced Golden Crown, which had entered the

market with "extremely low or below cost prices," to continue selling at a loss if it wished to keep the business it had taken away from Borden. The FTC therefore entered a cease-and-desist order prohibiting Borden from charging "unreasonably low prices"[7] and requiring Borden to maintain what Commissioner Pitofsky called a "legally mandated supra-competitive price." (FTC-81a).

Three of the five Commissioners also condemned Borden's practice of "tailoring" its price reductions "to the competitive situation in individual areas." (FTC-58a). The cease-and-desist order therefore also requires Borden to charge uniform national prices, with reductions allowed only to the extent "attributable to differing costs." (FTC-93a). Two Commissioners dissented from this holding; as Commissioner Clanton explained, the majority's approach "sacrifices both efficiency and consumer welfare and is contrary to the overriding goal of the antitrust laws to protect competition, not competitors." (FTC-74a-75a).

A divided panel of the Sixth Circuit Court of Appeals affirmed in February 1982. The majority adopted the FTC's market definition and finding of monopoly power, and held that Borden's price reductions were predatory because they "affected competition adversely through selective geographic price promotions and unreasonably low prices." (CA-29a). Judge Kennedy filed a vigorous dissent:

> "Borden surely meant to obtain as much of the reconstituted lemon juice market as it could, but that is the very essence of normal competition, a goal that we approve even for a monopolist. Despite the majority's assertion to the contrary this *is* simple, healthy com-

[7] Under the order, unreasonableness is to be "determined by reference to Borden's own costs, its awareness of its competitors' costs, historic price differentials, and competitive conditions in the market." (FTC-68a n.41, 94a).

petition. The alternative is that Borden must have intended not to respond when its market share began to disappear, but not even a monopolist need act so irrationally. . . . It is simply good business practice, not a use of monopoly power, to lower prices only where competition is stiff." (CA-35a).

REASONS FOR GRANTING THE WRIT

I. A Company That Has Lawfully Obtained A Dominant Market Position Should Not Be Prohibited From Responding To Local Competition By Reducing Its Prices

The decision below creates a conflict with six other Circuits that have upheld the right of any seller, even a monopolist, to meet its competitors' prices.[8] Moreover, the decision is extraordinarily anti-competitive, insisting that Borden maintain uniform national prices so that "new or toehold entrants [can] penetrate markets without fear" of local price competition from Borden. (FTC-69a). This Court should grant certiorari to reaffirm that "the antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*' "[9] and to resolve the newly-created conflict between the Circuits on the question of whether a firm's *profitable* price competition can be regarded as pred-

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[8] *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 86-93 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1438 (1982); *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 723-25 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Chillicothe Sand & Gravel Co.* v. *Martin Marietta Corp.*, 615 F.2d 427, 432 (7th Cir. 1980); *SuperTurf, Inc.* v. *Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981); *California Computer Products, Inc.* v. *IBM*, 613 F.2d 727, 742-43 (9th Cir. 1979); *Pacific Engineering Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

[9] *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (Court's emphasis).

atory. The issue is vitally important because "predatory pricing is difficult to distinguish from vigorous price competition. Inadvertently condemning such competition as an instance of predation will undoubtedly chill the very behavior the antitrust laws seek to promote." *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1438 (1982).

A. A Dominant Firm That Is Losing Business To A Price-Cutting Competitor Is Allowed To Lower Its Prices To Meet Competition

Every recent monopolization case has rejected the position adopted below that a monopolist must maintain a "price umbrella" so that new competitors can enter the market and take away its business. These cases recognize that every seller may "aggressively compete in the marketplace"; "even if [defendant] is a monopolist, it [is] within its rights to respond to the lower prices of its competitors." *SuperTurf, Inc.* v. *Monsanto Co.*, 660 F.2d 1275, 1280-81 (8th Cir. 1981). For example, the Ninth Circuit affirmed a directed verdict in *California Computer Products, Inc.* v. *IBM*, 613 F.2d 727, 739, 741-42 (9th Cir. 1979), holding that "IBM had the right to respond to the lower prices of its competitors" because such "price cuts were a part of the very competitive process the Sherman Act was designed to promote." As explained in a related case:

> "A company should not be guilty of predatory pricing, regardless of its costs, when it reduces prices to meet lower prices already being charged by its competitors. To force a company to maintain non-competitive prices would be to turn the antitrust laws on their head." *ILC Peripherals Leasing Corp.* v. *IBM*, 458 F.Supp. 423, 433 (N.D. Cal. 1978), *aff'd per curiam sub nom. Memorex Corp.* v. *IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

Similarly, the Tenth Circuit has twice reversed trial judges who erroneously found "predatory pricing" when monopolists were reacting to the lower prices of their competitors. *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *Telex Corp.* v. *IBM*, 510 F.2d 894, 926-28 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).[10] The Second Circuit likewise reversed a finding of predatory pricing in *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 87 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1438 (1982), rejecting the idea that a monopolist must maintain "a price 'umbrella' under which less efficient firms could hide from the stresses and storms of competition." On similar grounds, the Seventh Circuit affirmed a directed verdict in favor of a monopolist who had underpriced a small rival, concluding that this was "the essence of competition," not predatory pricing. *Chillicothe Sand & Gravel Co.* v. *Martin Marietta Corp.*, 615 F.2d 427, 433 (7th Cir. 1980). The Fifth Circuit agreed in a case where the plaintiff alleged that he could not compete because a monopolist had lowered prices in the plaintiff's area to a point below the plaintiff's costs. *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 724-25 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

Because the decision below ignored these cases and denied Borden the right to respond to the lower prices of its competitors, this Court should grant certiorari to make it clear that even a monopolist is allowed to engage in normal price competition.

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[10] In *Pacific Engineering*, even though the monopolist knew its competitor "could not survive at the low price level," the Tenth Circuit nevertheless held that the monopolist had no obligation "to raise prices to a noncompetitive level in order to save its smaller, undercapitalized rival." 551 F.2d at 792, 795.

B. A Dominant Firm Can Tailor Its Price Reductions To Those Markets Where Competition Is Strong And Prices Are Low

This Court should also reverse the unprecedented holding that a monopolist must maintain essentially uniform national prices, regardless of local competition. Such a rule is in "open conflict with the purposes of . . . antitrust legislation," for it "would lead to just such price uniformity and rigidity" that the Sherman Act was designed to prevent. *See Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979). As Judge Kennedy explained in her dissent: "It is simply good business practice, not a use of monopoly power, to lower prices only where the competition is stiff." (CA-35a).

The decision below conflicts with many recent monopolization cases that have presented exactly the situation found here. In each of those cases, the defendant reduced prices only in those geographic or product markets where it faced vigorous competition; yet, allegations of predatory pricing were uniformly rejected as a matter of law.[11] "The fact that [defendant] was charging higher prices in another submarket does not change its legitimate competition into an injury to competition." *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 798 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

The decision also conflicts with the Robinson-Patman Act, in which Congress specifically legislated on the subject of

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[11] *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 854-55 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *California Computer Products, Inc.* v. *IBM*, 613 F.2d 727, 740 (9th Cir. 1979); *Telex Corp.* v. *IBM*, 510 F.2d 894, 924 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

price discrimination. The Act makes it unlawful "to discriminate in price . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly." This prohibition, however, is subject to one paramount right: the seller is entitled *"to meet an equally low price of a competitor. . . ."*[12] Thus, Congress weighed the competing policies and concluded that encouraging competition is more important than prohibiting "price discrimination," even when the result may be "to create a monopoly." This right to meet competition is "an absolute defense to liability for price discrimination." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 450 (1978). The decision below, however, turned that congressional judgment on its head; the decree is patterned on the Robinson-Patman Act, but deliberately omits the right "to meet an equally low price of a competitor." Accordingly, this Court should grant certiorari and reverse the decision below.

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[12] The Robinson-Patman Act, 15 U.S.C. § 13, provides in pertinent part:

> "(a) It shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition. . . . *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . .
>
> "(b) . . . *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . ."

II. A Dominant Firm That Sells A Product Which Has Gained Consumer Acceptance Should Not Be Prohibited From Engaging In Vigorous Price Competition As Long As Its Prices Remain Above Cost

A. Predatory Pricing Does Not Occur Unless Prices Fall Below Cost

The conclusion below that Borden engaged in predatory pricing, even though its sales were always profitable and its prices always above cost, also conflicts with the position taken by the Second, Fifth, Seventh, Eighth, Ninth and Tenth Circuits.[13] These courts agree that a price above cost "is a fairly competitive price, for it is profitable to the monopolist if not to its rivals." *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 723 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). Such a price "contribute[s] to the company's cash flow" and thus reflects "rational, competitive behavior." *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977). As the Seventh Circuit explained:

> "In selling at a level which was above average variable cost, [defendant] acted in an economically rational manner, derived immediate benefit from its sales, and did not engage in the 'deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition.'" *Chillicothe Sand & Gravel Co.* v. *Martin Marietta Corp.*, 615 F.2d 427, 432 (7th Cir. 1980), *quoting* P. Areeda & D. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 698 (1975).

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[13] Indeed, "virtually every court and commentator agrees upon the legality of a price exceeding average cost, perhaps conclusively but at least presumptively." P. Areeda, *Antitrust Law* ¶ 711.1 (Supp. 1982).

The courts have identified several reasons for examining the relationship between prices and costs when judging predatory pricing claims. First, "pricing at marginal cost is the competitive and socially optimal result."[14] "Forcing a monopolist to charge a price higher than marginal cost could reduce industry output and waste economic resources." *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). Second, this test "has the considerable virtue of offering a single bright line formulation which would provide guidance as to permissible behavior to businessmen and also guidance to the courts and enforcement agencies." (FTC-84a, Pitofsky, C., concurring). And third, when a price exceeds cost there is no danger that the dominant firm is "subsidizing" its price reductions with profits earned in less competitive markets; the very fact that prices are above cost means that every sale adds to profits and none need a subsidy. Thus, the lower courts have consistently held that "subsidization" can occur *only* when price falls below cost.[15]

The present case, like those discussed above, was tried on the theory that Borden had sold ReaLemon at prices below cost—specifically, at prices below *average variable cost*, one

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[14] *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 857 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *SuperTurf, Inc.* v. *Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981); *accord*, *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

[15] *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 725 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 89 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1438 (1982); *ILC Peripherals Leasing Corp.* v. *IBM*, 458 F.Supp. 423, 432 (N.D. Cal. 1978), *aff'd per curiam sub nom. Memorex Corp.* v. *IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

of the generally accepted tests for predatory pricing.[16] The allegation, however, was clearly disproven: "The ALJ did not find that 'ReaLemon' was sold below cost, nor do we." (FTC-68a). Nevertheless, the court below found predatory pricing, reaching a result contrary to the law of six other Circuits. This Court should resolve the conflict and hold that *profitable* price competition is lawful. As long as this straightforward test for predatory pricing is used, there is no conflict between the seller's goal of seeking higher profits, the economist's goal of promoting efficiency, and the Sherman Act's goal of facilitating competition.

B. A Dominant Firm Is Not Required To Avoid Otherwise Lawful Price Competition Simply Because Consumers Are Willing To Pay A Premium Price For Its Products

The court below ignored Borden's right to meet competition and to charge any price above cost because it found this case to present "the unique situation of a monopolist marketing a product which could command a premium price, giving

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[16] The lower courts are in general agreement that the proper measure of cost is *marginal cost*, but "because marginal cost cannot be determined from conventional accounting methods, we will use *average variable cost* as its surrogate." *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 88 (2d Cir. 1981) (citing cases from four other Circuits), *cert. denied*, 102 S.Ct. 1438 (1982). "*Marginal cost* is the increment to total cost that results from producing an additional increment of output. . . . *Variable costs*, as the name implies, are costs that vary with changes in output." Areeda & Turner, *supra*, 88 Harv. L. Rev. at 700 (emphasis added). Variable costs are distinguished from fixed costs, such as the cost of a plant, that must be paid regardless of the quantity produced.

In the present case, the FTC's expert witness recommended the use of such an average variable cost test (JA-52-53), and that was the basis for the unsuccessful attempt to prove that Borden's prices had fallen below cost. (ALJ-166a-176a).

it significant pricing leverage over its competitors."[17] (CA-28a-29a). The court held that because Borden had traditionally charged a higher price than most other sellers, it must continue to do so; any reduction in prices to recapture lost business was seen as "manipulation" of the "price premium" and therefore illegal.

The so-called price premium, however, is not "unique" and certainly does not justify a deviation from the established law of monopolization. Many well-known brand names bring higher prices, but that fact has never limited the seller's right to compete. For example, in *California Computer Products, Inc.* v. *IBM*, 613 F.2d 727, 740 n.23 (9th Cir. 1979), the evidence showed that IBM's products commanded a price premium; competitors could take business away from IBM only by charging significantly lower prices. But that fact did not affect IBM's right to cut its own prices. On the contrary, the court held that the plaintiff's failure to show sales by IBM at prices below cost "was a failure as a matter of law to present a *prima facie* case under § 2." 613 F.2d at 742-43. Similarly, the Tenth Circuit has held that a monopolist can respond to a competitor's price cuts even if it knows the competitor "could not survive at the low price level." *Pacific Engineering Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 792 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977). *Accord, International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 723-25 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

[17] The "price premium" is simply a reflection of the fact that consumers have learned to trust ReaLemon as a quality product and are willing to pay a few pennies more for ReaLemon than for most other brands. As Judge Kennedy observed, consumers "pay extra for ReaLemon to minimize their risk of receiving inferior goods," such as Golden Crown's adulterated product. (CA-38, n.5).

The real basis for the FTC's decision, upheld by the Sixth Circuit, was the belief that ReaLemon's "price premium" was *undeserved*, and thus monopolistic, because it was not the "consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). Chairman Pertschuk said he could not "avoid a value judgment" that it is "socially undesirable" for monopolists to prevail over "producers handicapped only by an inferior brand image."[18] (FTC-65a). His majority opinion repeatedly condemned ReaLemon's "spurious product differentiation" and "image-inducted [*sic*] price premium" which "stemmed from the creation of 'an almost imaginary superiority' in the consumer's mind." (FTC-62a, 63a, 66a). He believed consumers were unwisely paying extra money: "ReaLemon is distinguished from its competitors only by the strength of its trademark." (FTC-66a).

The FTC completely misunderstood *Grinnell* and this Court's statement that "growth or development as a consequence of a superior product" is not monopolization. Under *Grinnell*, superiority is determined by consumers in the marketplace, not by the FTC on the basis of its dubious "value judgment." As the Second Circuit pointed out: "If a monopolist's products gain acceptance in the market, . . . it is of no importance that a judge or jury may later regard them as inferior, so long as that success was not based on any form of coercion." *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 287 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). Judge Kennedy was certainly correct when she wrote that the FTC's "value judgment . . . has nothing to do with the 'use of monopoly power' that Sec-

[18] Of course, Golden Crown suffered from more than "an inferior brand image." Its product was "adulterated," and thus, "consumers may have preferred the taste of ReaLemon to Golden Crown." (ALJ-176a n.3; FTC-50a n.16).

tion 2 reaches. Whether I agree or disagree with [this] value judgment, it has no place here." (CA-36a n.2).

The FTC also misunderstood this Court's statement in *Grinnell* that growth through "business acumen" is lawful. Such "business acumen" undoubtedly encompasses "shrewdness in profitable price competition." *California Computer Products, Inc.* v. *IBM*, 613 F.2d 727, 742 (9th Cir. 1979). It also encompasses Borden's success in convincing consumers to buy ReaLemon. As Judge Kennedy pointed out in her dissent:

> "Successfully promoting one's product is the epitome of the 'business acumen' that *Grinnell* states is *not* monopolization. . . . It is not a violation of the antitrust laws for a monopolist to take advantage of a consumer preference at the expense of its competitors." (CA-35a, 37a-38a) (emphasis in original).

Section 2 is directed at conduct "which makes it impossible for other persons to engage in fair competition," not at "ordinary marketing methods available to all in the market."[19] In this case, Borden used only such "ordinary marketing methods," all of which were available to its competitors. Any company was free to sell the product that ReaLemon invented and to enter the market that ReaLemon developed. Any company could bottle the product, register a trademark, promote it, and attempt to convince consumers that its product was as good as ReaLemon's. The FTC thought that Borden's marketing methods were not "available" to its competitors because their brand names did not *instantly* have the same degree of consumer acceptance that

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[19] *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 390 & n.15 (1956) (quoting legislative history); *Telex Corp.* v. *IBM*, 510 F.2d 894, 926 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 93 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1438 (1982).

ReaLemon had achieved through years of providing a quality product. But the Sherman Act does not guarantee overnight success. It is not a crutch for new entrants who cannot withstand honest, head-to-head competition in the marketplace. Sellers are not entitled to the protection of an "umbrella price," as the FTC held. Nor are they entitled to be free from local price competition, as the FTC decreed. Because the decision below ignored these principles, certiorari should be granted and the decision reversed.

III. A Company Which Is Forced To Choose Between Lowering Its Prices Or Losing Much of Its Business Does Not Possess "Monopoly Power" Simply Because It Has A Large Percentage Share Of A Narrowly-Defined Market And Because Consumers Are Willing To Pay More For Its Brand-Name Product

This Court should also grant certiorari on the threshold question of whether Borden possessed "monopoly power" —"the power to control prices or exclude competition." *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). The decision below is inconsistent with the law of monopolization in four respects.

First, the FTC used the wrong test in determining whether Borden had "the power to control prices." It reasoned that Borden held such power because, by lowering its own prices, Borden could force its competitors to lower theirs. But the power to drive *down* prices is the power held by any competitor; as this case demonstrates, even Golden Crown was able to drive down the price of the dominant brand, ReaLemon. Monopoly power is just the reverse: it is the ability of a dominant firm to *raise its own prices,* unconstrained by the forces of competition. "The material consideration in determining whether a monopoly exists is [whether] . . . power exists to *raise* prices or to

exclude competition when it is desired to do so." *American Tobacco Co.* v. *United States*, 328 U.S. 781, 811 (1946) (emphasis added). Only when prices can be "raised substantially without . . . losing business" does a seller have monopoly power. *Broadway Delivery Corp.* v. *United Parcel Service*, 651 F.2d 122, 131 (2d Cir. 1981). Borden did not have that power. Indeed, it could not raise prices *even to keep pace with rising costs*: "planned price increases for quart bottles of ReaLemon, occasioned by cost increases, [did not] go into effect in 'highly competitive Golden Crown markets.'" (FTC-57a).

Second, the FTC erroneously concluded that ReaLemon's "price premium" gave it the "power to control prices." But the fact that a well-known product such as ReaLemon sells for a higher price than most other brands does not mean the seller has monopoly power; it simply means that consumers regard the product as superior and will pay somewhat more for it. That is not the *control* over prices which signifies monopoly power. As Judge Kennedy explained:

> "The price premium did not exist because of the monopoly. It was nothing more than evidence of a consumer preference. . . . Manipulation of a consumer preference is not a use of monopoly power unless the preference was somehow created by the monopoly position in the market, and there is no such finding here." (CA-37a).

Third, the FTC erroneously equated the concept of a "barrier to entry" with the ability to "exclude competition." It concluded that the "strength" of the "ReaLemon" trademark was a barrier to entry into the processed lemon juice market. (FTC-52a). But, as this Court has recognized, the "power that . . . soft-drink manufacturers have over their trademarked products is *not the*

power that makes an illegal monopoly." *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956) (emphasis added). Moreover, the "RealLemon" trademark certainly did not give Borden the power to exclude competition, particularly in light of the fact that all other barriers to entry were "insignificant."[20] Even Golden Crown, with an adulterated product that was advertised only "on a minor scale in selected markets" (CA-21a), was able within four years to capture 15% of all national sales (and a much higher percentage in a great many local markets). Minute Maid was able to grow still more rapidly, despite selling a *more expensive* product. In just six months, its share jumped from 5.6% to 18.2%. Meanwhile, Borden's share dropped to 65%, compared to almost 90% a few years earlier.[21] When new competitors are able to enter a market this rapidly and this effectively, notwithstanding price competition thought to be "predatory," the dominant firm cannot be said to have the power to "exclude competition."

Finally, the FTC erred in ignoring the fact that Borden had no power to control prices or exclude competition, and relying instead upon an inference drawn from Borden's large share of a narrowly-defined market. In defining the relevant market, the FTC excluded fresh lemons, even though the evidence clearly established that the juice of

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[20] The FTC found that other barriers to entry, including "capital costs, absolute costs, and scale economies, are insignificant." (FTC-69a). "Processed lemon juice is not difficult to manufacture. . . . The raw materials are readily available . . . and the product can be produced using relatively inexpensive equipment." (FTC-41a).

[21] At this level, RealLemon did not have a monopolist's share, even within the narrow market defined by the FTC. As Judge Learned Hand pointed out, "it is doubtful whether 60 to 64 percent would be enough" for a finding of monopoly power. *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

fresh lemons can be and is substituted for every use of reconstituted lemon juice. (JA-495-510, 526-36, 861A). This narrow market definition was crucial to the FTC's finding of monopoly power,[22] but that finding was contrary to the undisputed evidence that Borden could not control prices or exclude competition. A seller such as Borden, which is forced to choose between lowering its own prices or suffering large cuts in its market share, certainly does not have "monopoly power." This Court should grant certiorari to reverse the clearly erroneous finding that it had such power.

[22] "The inclusion of fresh lemons within the product market would necessarily preclude a finding of monopoly power because this would have reduced Borden's market share . . . to less than ten percent." (CA-12a & n. 20).

CONCLUSION

The decision below, by restricting price competition and requiring Borden to maintain a nationally uniform "umbrella" price, denies consumers the benefits of competition previously ensured by the antitrust laws. Equally important, it ignores the central principle that "dominant firms, having lawfully acquired monopoly power, *must* be allowed to engage in the rough and tumble of competition." *Northeastern Tel Co.* v. *AT&T*, 651 F.2d 76, 79 (2d Cir. 1981) (emphasis added), *cert. denied*, 102 S.Ct. 1438 (1982). As Judge Learned Hand pointed out long ago, a "successful competitor, having been urged to compete, must not be turned upon when he wins." *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945). That is exactly what the Sixth Circuit and the FTC erroneously did in this case. Certiorari should be granted and the decision reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER 1982 TERM

BORDEN, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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No. 79-3028

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BORDEN, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION to Review an Order of the Federal Trade Commission.

Decided and Filed February 24, 1982.

Before KENNEDY and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge, delivered the opinion of the Court, in which JONES, Circuit Judge, joined. KENNEDY, Circuit Judge (pp. 33-38) filed a separate dissenting opinion.

PHILLIPS, Senior Circuit Judge. This case is before the court on a petition to review an order of the Federal Trade Commission, finding that Borden, Inc., the petitioner, violated § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The decision and order of the Commission are reported at 92 F.T.C. 669-833 (1978). The Commission found that Borden used unfair methods of competition in the sale of a reconstituted lemon juice product known as ReaLemon. The complaint charged unfair methods of competition through promotional pricing of ReaLemon in geographic markets where Borden faced competition from Golden Crown Citrus Corporation, a recent entrant into the reconstituted lemon juice

business, with the unlawful intent to maintain ReaLemon's monopoly power.

The principal issues are (1) what is the relevant product market within which Borden's conduct should be assessed, (2) whether Borden possessed monopoly power within the relevant product market, (3) whether Borden's acts and practices in the sale of ReaLemon amounted to the illegal maintenance of its monopoly power, and (4) whether the Commission's remedy was related reasonably to the alleged unlawful practice it sought to curtail. For the reasons stated below, the court concludes that the findings of the Commission are supported by substantial evidence on the record and the prescribed remedy is within the power of the Commission. Accordingly, we affirm the opinion and order.

I

The ReaLemon business was begun in 1935. The original product was bottled lemon juice. Subsequently the product was changed to reconstituted lemon juice, made from lemon juice concentrate, water and a preservative. Reconstituted lemon juice was marketed successfully as a convenient substitute for fresh-squeezed lemon juice. Sometime in the 1940's the ReaLemon trademark was developed and used for the reconstituted lemon juice product. At that time ReaLemon was the only nationally advertised and distributed processed lemon juice, and its advertising during the 1940's and 1950's was aimed at converting users of fresh lemons to the ReaLemon product.

During the late 1950's and 1960's local business concerns began bottling reconstituted lemon juice in competition with ReaLemon on a regional basis. The emphasis of ReaLemon's advertising and pricing was changed in response to this competition. Sunkist was the only bottler of reconstituted lemon juice to attempt to compete with ReaLemon on a national basis, but in the late 1950's and early 1960's Sunkist re-

trenched to regional distribution. Since that time ReaLemon has remained the sole nationwide bottler and distributor of reconstituted lemon juice.

Borden purchased the ReaLemon-Puritan Company in 1962 for approximately $12.4 million. Borden has operated its wholly owned subsidiary as ReaLemon Foods.[1] At the time of the complaint, Borden had annual sales of over $2 billion, its 1972 income after taxes was $66 million, and it had assets of approximately $1.3 billion. In 1973 sales of reconstituted lemon juice by Borden's subsidiary totaled about $22 million, generating a net income of $3.5 million.

By comparison, Golden Crown Citrus Corporation was a small company based in Chicago in the late 1960's which produced and sold reconstituted lemon juice in the Chicago area. In 1969 Golden Crown embarked on a plan to expand its sales beyond Chicago to the midwest and later to other markets in the northeast and southeast. Golden Crown's method of expansion was to sell its product to retailers at prices well below those of ReaLemon. It relied almost entirely on its lower prices for its acceptance in other markets. The Commission found that retailers usually have only enough shelf space for two brands of reconstituted lemon juice and they generally limited their sales to ReaLemon and the brand of one lower priced competitor. Consequently, from 1969 through 1971 Golden Crown's expansion into other geographic areas succeeded mainly at the expense of other local competitors Golden Crown displaced on store shelves. In 1971, however, the significant price differential between Golden Crown and ReaLemon began to make inroads on the sales of ReaLemon. Borden's response to this competition from Golden Crown forms the principal basis of the FTC complaint charging Borden with unlawfully maintaining monopoly power in the production, distribution and sale of reconstituted lemon juice in the United States.

[1] Since ReaLemon is a wholly owned subsidiary of Borden, their names are used interchangeably in this opinion.

II

On July 2, 1974, the FTC issued a complaint charging Borden with violations of § 5 of the Federal Trade Commission Act. Administrative Law Judge (ALJ) Daniel Hanscom conducted extensive hearings, received several thousand pages of exhibits and heard testimony from numerous economists and experts on behalf of Borden and the FTC.[2] On August 19, 1976, ALJ Hanscom issued a comprehensive initial decision finding that Borden had violated § 5.[3] The ALJ found that for purposes of analyzing Borden's conduct, the relevant product market was processed lemon juice.[4] Because of different product characteristics, and economic and commercial realities, the ALJ rejected Borden's contention that the relevant market included fresh lemons, finding instead that processed lemon juice was, at the least, a proper submarket.[5] Based upon Borden's share of the relevant market, the industry concentration ratios, ReaLemon's dominant brand name, its ability to command a premium price because of strong consumer preferences, ReaLemon's rate of return on its assets, Borden's substantial resource advantages, and ReaLemon's power to control prices and entry into the market, the ALJ further found that Borden possessed monopoly power within the processed lemon juice market.[6] He found Borden had maintained this monopoly power unlawfully through extensive promotions and price reductions in selected geographic markets

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[2] The hearings extended over a period of seven weeks, with testimony from 74 witnesses. The hearing transcript totaled over 6,000 pages with an additional 12 binders of exhibits.

[3] *Borden, Inc.*, 92 F.T.C. 669 (1978).

[4] Processed lemon juice was defined by the Commission as including reconstituted lemon juice, frozen reconstituted lemon juice, processed fresh lemon juice, frozen fresh lemon juice and imitation lemon juice. The geographic market was found to be the United States as a whole.

[5] 92 F.T.C. at 675-702.

[6] 92 F.T.C. at 702-718.

where it faced competition from Golden Crown. He further found that the 32 ounce size ReaLemon[7] was sold to large grocery chains in Philadelphia and Buffalo at "unreasonably low prices." Because of the premium price the ReaLemon brand name commanded, ReaLemon's promotions and unreasonably low prices forced competitors either to sell their product at prices below their costs or lose their share of the market to Borden. The ALJ determined that these practices violated § 5, and ordered Borden to grant compulsory trademark licensing of the ReaLemon name and label design for ten years. The ALJ further ordered that Borden cease and desist from granting price reductions resulting in different net prices among ReaLemon customers competing in the same geographic area, selling ReaLemon below costs or at unreasonably low prices with the effect of hindering competition, and granting promotional allowances with the effect of hindering or eliminating competition.

Borden appealed the initial decision of the ALJ to the Commission. The opinion and order[8] of the Commisison were filed November 7, 1978. The Commission adopted the factual findings of the ALJ, made further findings and modified the remedy. With respect to the relevant product market, the Commission disagreed with Borden's assertion that a submarket analysis was improper in a case involving the unlawful maintenance of monopoly power. Applying the criteria of *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), the Commission held that processed lemon juice constituted a valid submarket within which to analyze Borden's business practices and that fresh lemons were properly excluded.[9] The

[7] ReaLemon was sold in various sizes and containers but the 32-ounce size bottle was the primary concern of the F.T.C. complaint because this size was promoted heavily by Borden in competition with Golden Crown's 32-ounce size.

[8] 92 F.T.C. 778.

[9] 92 F.T.C. at 784-88. The F.T.C. found that even without resort to the *Brown Shoe* submarket criteria, processed lemon juice was the relevant product market.

Commission also adopted the finding of the ALJ that Borden possessed monopoly power within the product market.

In finding that Borden unlawfully maintained its power through the predatory pricing of ReaLemon, the Commission found that neither Borden nor Golden Crown was appreciably more efficient than the other and that ReaLemon's sales in Buffalo and Philadelphia at "unreasonably low prices," without cost justification, were below its average total costs.[10] In order to overcome ReaLemon's significant premium price advantage, competitors such as Golden Crown had to price well below ReaLemon, and below their own average variable costs, to survive in the market. The Commission found that Borden had practiced predatory pricing with the intent to exclude an equally efficient competitor, Golden Crown.

The Commission modified the remedies proposed by the ALJ, by eliminating the requirement that Borden license the ReaLemon trade name. A majority of the Commission felt that the prohibition against unreasonably low prices was a sufficient means of dissipating Borden's illegally used monopoly power without resorting to the more drastic step of compulsory trademark licensing. In addition, the Commission narrowed the scope of the order of the ALJ by prohibiting price reductions resulting in different net prices among ReaLemon customers only in geographic areas where the price differences were not cost justified and in effect restrained or eliminated competition.

III

It is to be emphasized that the present action is to review an order and opinion of the Commission — it is not a suit under the Sherman or Clayton Acts.

[10] Commissioners Clanton and Pitofsky while concurring with the opinion of the Commission, proposed different tests for determining the maintenance of monopoly power.

The Federal Trade Commission Act, authorizing the Commission to issue cease and desist orders, is "not a revenue-raising or a penal measure," *United States* v. *St. Regis Paper Co.*, 355 F.2d 688, 693 (2d Cir. 1966). To make effective its policy to preserve and promote competition, Congress "relied upon the initiative of administrative officials and the flexibility of the administrative process." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 640 (1950). Congress intentionally left § 5 broad and generally undefined, delegating power to the Commission to determine when practices violate the Act. The proscriptions in § 5 are flexible and are "to be defined with particularity by the myriad of cases from the field of business." *F.T.C.* v. *Colgate Palmolive Co.*, 380 U.S. 374, 385 (1965). In *Atlantic Refining Company* v. *F.T.C.*, 381 U.S. 357, 367 (1965), the Supreme Court emphasized the function of the Commission to deal with changing business practices as follows:

> Section 5 of the Federal Trade Commission Act declares "[u]nfair methods of competition in commerce, and unfair . . . acts or practices in commerce . . . unlawful." In a broad delegation of power it empowers the Commission, in the first instance, to determine whether a method of competition or the act or practice complained of is unfair. The Congress intentionally left development of the term "unfair" to the Commission rather than attempting to define "the many and variable unfair practices which prevail in commerce . . . ." S. Rep. No. 592, 63d Cong., 2d Sess., 13. As the conference report stated, unfair competition could best be prevented "through the action of an administrative body of practical men . . . who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations." H. R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., 19. In thus divining that there is no limit to business ingenuity and legal gymnastics the Congress displayed much foresight. See *Fed-*

> *eral Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 693 (1948).

See also American Cyanamid Company v. *F.T.C.*, 363 F.2d 757, 769 (6th Cir. 1966).

We turn now to the standards to be applied in reviewing the factual findings and conclusions of the Commission. While the ultimate responsibility for construing the FTC Act rests with the courts, "the determinations of the Commission, an expert body charged with the practical application of the statute, are entitled to great weight." *F.T.C.* v. *Texaco, supra*, 393 U.S. at 226.[11] The findings of the Commission are conclusive if supported by substantial evidence, *J. B. Williams Co.* v. *F.T.C.*, 381 F.2d 884, 891 (6th Cir. 1967), even though the evidence might also support a contrary finding. *American Home Products Corp.* v. *F.T.C.*, 402 F.2d 232, 237 (6th Cir. 1968). Our task is not to second guess the Administrative Law Judge and the Commission on questions of credibility and testimonial weight, *Charles Pfizer* v. *F.T.C.*, 401 F.2d 574, 584 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969);[12] nor, as Borden advocates, are we to pick and choose among uncertain and conflicting inferences to be drawn from the evidence. *Safeway Stores, Inc.* v. *F.T.C.*, 366 F.2d 795, 800 (9th Cir. 1966), *cert. denied*, 386 U.S. 932 (1967).

The substantial evidence rule for reviewing an FTC order has been described as follows:

> We have consistently reiterated – and we emphasize the point again now – that when Congress has vested in a Federal agency plenary authority to investigate and

[11] *See also, Atlantic Refining Co. supra*, 381 U.S. at 368, *F.T.C.* v. *Cement Institute*, 333 U.S. 683, 720 (1948). Even when the Commission's findings are framed in terms of legal conclusions, their presumptive validity is considerable. *Colonial Stores, Inc.* v. *F.T.C.*, 450 F.2d 733, 740 n. 14 (5th Cir. 1971).

[12] *See also Guziak* v. *F.T.C.*, 361 F.2d 700, 703 (8th Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967).

> regulate particular forms of commercial or economic activity, entrusting it with primary responsibility for the resolution of complex and usually sharply disputed factual issues, appellate court review of the exercise of that authority is confined by the narrow perimeter of the substantial evidence rule. Findings of fact cannot and will not be set aside if the evidence in the record reasonably supports the administrative conclusion, even though suggested alternative conclusions may be equally or even more reasonable and persuasive. The findings must stand unless they were wrong, and they cannot be wrong – that is, reversibly wrong – if substantial evidence supports them.

(Footnotes omitted), *Colonial Stores* v. *F.T.C.*, 450 F.2d 733, 739-40 (5th Cir. 1971).

Thus Borden has the burden of persuading this Court that the evidence in the record is not sufficient to support the Commission's findings and conclusions. Borden argues that the testimony of certain witnesses on behalf of the FTC is not credible, that other inferences may be drawn from the voluminous testimonial and documentary evidence, and that the expertise of the Commission should be disregarded in reviewing its economic analysis of the conflicting definitions of predatory pricing advocated for this case. These arguments are contrary to the standards of review to be applied by this court. Congress has delegated to the Commission, an administrative agency possessing specialized knowledge of marketing techniques and sales practices, the initial responsibility of resolving the knotty, technical economic problems presented by Borden's conduct. This court holds that the inferences drawn from the evidence by the Commission, and its findings and conclusions, are supported by substantial evidence.

IV

The broad power of the Commission to determine whether a practice is unfair is "particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws." *F.T.C.* v. *Brown Shoe Co.*, 384 U.S. 316, 321 (1966). Section 5 may be construed *in pari materia* with the antitrust laws, *American Cyanamid, supra*, 363 F.2d at 770, and the antitrust laws may serve as a guide or declaration of policy for the Commission to consider in determining what constitutes an unfair method of competition. *New Jersey Wood Finishing Co.* v. *Minnesota Mining & Mfg. Co.*, 332 F.2d 346, 351 (3rd Cir. 1964), *aff'd*, 381 U.S. 311 (1695); *Luria Brothers & Co.* v. *F.T.C.*, 389 F.2d 847, 859-60 (3rd Cir.), *cert. denied*, 393 U.S. 829 (1968).

Although it is well settled that methods of competition need not violate the Sherman or Clayton Acts in order to constitute a violation of § 5 of the Federal Trade Commission Act,[13] in the present case, the Commission seems to have restricted itself to a Sherman Act analysis, as indicated in the following language of its opinion:

> Although this case was brought and is decided under Section 5 of the FTC Act, it sounds basically in monopolization. Accordingly, the law under Section 2 of the Sherman Act is used to provide guidance for the application of Section 5, both as to the issue of market definition and the substantive standard of illegality.[15]

Although there is language in the majority decision of the Commission suggesting determination under the standards of

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[13] *New Jersey Wood Finishing Co.* v. *Minnesota Mining & Mfg. Co.*, 332 F.2d 346, 351 (3rd Cir. 1964), *aff'd*, 381 U.S. 311 (1965); *Luria Brothers & Co.* v. *F.T.C.*, 389 F.2d 847, 859-60 (3rd Cir.), *cert. denied*, 393 U.S. 829 (1968).

[14] *F.T.C.* v. *Texaco*, 393 U.S. 223, 225 (1968); *F.T.C.* v. *Brown Shoe*, *supra*, 384 U.S. at 322. *Luria Brothers* v. *F.T.C.*, *supra*, at 322.

[15] 92 F.T.C. at 781, n. 4.

the FTC Act unlimited by the strictures of the Sherman Act, the decision seems to rest primarily on the law of monopolization under the Sherman Act. At one point the opinion states:

> In light of these overriding policies we must determine whether Borden's maintenance of monopoly control over the processed lemon juice market was economically inevitable, or whether, like Alcoa, it "meant to keep, and did keep" that control over the market with which it started. *Id.* at 432.
>
> That Borden, in the words of the *Alcoa* court, "meant to keep" its monopoly share is evident from its marketing plans.[16]

The Commission concluded that: "It can hardly be said that the maintenance of Borden's monopoly power was 'economically inevitable' . . . . Its maintenance was the result of a calculated strategy employing geographic price discrimination. . . ."[17]

The ALJ relied upon Sherman Act cases to find Borden guilty of monopolization.[18] Commissioner Pitofsky stated in his concurrence that the decision of the Commission rests on the conclusion that Borden violated § 2 of the Sherman Act.[19]

We restrict our review of the Commission's decision to the Sherman Act § 2 grounds relied upon by it. *Industrial Union Department AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607, 631, n. 31 (1980); *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

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[16] 92 F.T.C. at 795.

[17] 92 F.T.C. at 802.

[18] 92 F.T.C. at 767.

[19] 92 F.T.C. at 826.

V

The Commission's definition of the product market as processed lemon juice was crucial to its finding of maintenance of monopoly power. The inclusion of fresh lemons within the product market necessarily would preclude a finding of monopoly power because this would have reduced Borden's market share.[20] Borden contends that the undisputed facts establish that fresh lemons are reasonably interchangeable for every end use of ReaLemon, that the use of a submarket test under the Clayton Act is improper in a monopolization case, and that the evidence was not sufficient to support the finding that the processed lemon juice market did not include all other products containing lemon juice.

Borden's contention that fresh lemons and ReaLemon are reasonably interchangeable emphasizes the similarity of the end uses of the two products, and de-emphasizes other factors such as price differences, low cross-elasticity of demand, and quality differences between fresh lemons and ReaLemon. However, under *United States* v. *E. I. DuPont de Nemours & Co.*, 351 U.S. 377 (1956) (*Cellophane*), all of these factors are to be considered in assessing the reasonable interchangeability of products.[21] It is now well established that monopoly power is equated with the power to control prices or exclude competition.[22] As a consequence, in examining whether competition from other products prevents the possession of monopoly power, "[p]rice and competition are so intimately entwined that any discussion of theory must treat them as one."

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[20] Annual sales of fresh lemons were stated as approximately $200,000,000, and the inclusion of fresh lemons in the product market would reduce Borden's market share to less than ten per cent.

[21] "[The] market is composed of products that have reasonable interchangeability for the purposes for which they are produced — price, use and qualities considered." *Cellophane*, *supra*, 351 U.S. at 404.

[22] *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966); *Cellophane*, *supra*, 351 U.S. at 391.

Id. at 392. In *Cellophane* the court discussed the reasonable interchangeability of products in terms of cross-elasticity of demand,[23] and in terms of comparative costs of the products to consumers.[24]

The Commission's finding that low cross-elasticity of demand existed between fresh lemons and processed lemon juice is supported by the record. Buyers for large supermarket chains and representatives of processed lemon juice companies testified that price increases or decreases in fresh lemons had little or no effect on the prices or demand for processed lemon juice. This indicates they are in different competitive markets. ReaLemon Foods' president testified that increased prices for fresh lemons for a typical year did not cause an increase in either ReaLemon sales or reconstituted lemon juice sales as a whole.[25] Representatives of several regional processed lemon juice distributors agreed that changes in the price of

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[23] "What is called for is an appraisal of the 'cross-elasticity' of demand in the trade." *Id.* at 394. The court examined the cross-elasticity of demand between cellophane and other flexible wrappings as follows:

> An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other. If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane it would be an indication that a high cross-elasticity of demand exists between them; that the products compete in the same market. The court below held that the "[g]reat sensitivity of customers in the flexible packaging markets to price or quality changes" prevented du Pont from possessing monopoly control over price. 118 F. Supp., at 207. The record sustains these findings. (*Footnotes omitted.*) *Id.* at 400.

[24] "The Government stresses the fact that the variation in price between cellophane and other materials demonstrates they are noncompetitive. As these products are all flexible wrapping materials, it seems reasonable to consider, as was done at the trial, their comparative cost to the consumer in terms of square area." *Id.* at 400-01.

Cellophane was found to cost two or three times as much as its chief competitor for the flexible wrapping market, but to cost less than several other forms of flexible wrapping. The Court found those differences in cost did not give DuPont monopoly power over prices.

[25] *See* Findings 32 and 33, 92 F.T.C. at 668-9.

fresh lemons had little effect on the price of processed lemon juice.[26]

Testimony as to other important differences in the prices of fresh lemons and processed lemon juice support the Commission's finding of different markets. An executive vice president of a supermarket chain in the New York City area testified that the price of fresh lemons fluctuates on a weekly and even a daily basis.[27] Representatives of processed lemon juice companies stated that the prices of processed lemon juice are stable for long periods of time. Borden's own marketing plans, as well as testimony from other distributors, demonstrated that processed lemon juice prices were determined primarily in response to prices of competing brands of processed lemon juice. The Commission also considered the substantial price differences between fresh lemons and reconstituted lemon juice. One ounce of ReaLemon is roughly equivalent to the juice of one fresh lemon; thus, a 32 ounce bottle of ReaLemon is equivalent to the juice of about 32 lemons. Yet ReaLemon's 1973 marketing plan stated that the juice from fresh lemons costs between three and five times more than ReaLemon. Since ReaLemon sold at a premium price and competing brands consistently had to sell at lower prices, the price differential between other brands and fresh lemons was even larger. Despite this substantial price gap, the volume of sales of fresh lemons is much greater than

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[26] Borden's claim of direct evidence contradicting the Commission's findings is insufficient. Borden points to testimony from only two witnesses to support its argument of price responsiveness between fresh lemons and processed lemon juice. One sales manager for a regional distributor stated that he "would be hazarding a guess" that a correlation existed between the lower price of fresh lemons and a decline in sales of his company's product during the same time period. The other witness, the president of a regional distributor, stated that a very high price for lemons will affect the movement of lemon juice in that "a housewife will have the option to buy lemon juice other than fresh lemons." He also testified, however, that no correlation existed between retail fresh lemon prices and retail processed lemon juice prices.

[27] *See* Finding 28, 92 F.T.C. at 683.

processed lemon juice and has not declined as processed lemon juice sales have grown over the years.

Furthermore, the record supports the Commissioner's finding that ReaLemon is not reasonably interchangeable with fresh lemons. Borden asserts that ReaLemon may be substituted for each and every end use of the juice from fresh lemons. The *Cellophane* test, however, is not merely whether one product can be substituted for the use of another product, but whether products may be reasonably interchanged for the purposes for which they are produced when prices, uses, and qualities of the products are considered.[28] In *Cellophane* the court examined the flexible wrapping market for differences in quality as perceived by buyers of flexible wrapping and the degree to which those differences affected their buying decisions. 351 U.S. at 397-400. If the quality differences between two products are such that consumers would not consider one product a viable substitute for another in making their purchasing decisions, regardless of whether one product actually can be substituted for the use of another, then these quality differences must be considered in determining the reasonable interchangeability of the products in a competitive market. The Commission considered the quality differences between fresh lemons and processed lemon juice and found a number of undisputed differences which affect a consumer's purchasing decision. Documents from Borden, market studies, and testimony from numerous distributors showed that conspicuous differences are the greater convenience and storage capabilities of processed lemon juice over fresh lemons. Processed lemon juice is available for immediate use while fresh lemons must be squeezed for the juice. Processed lemon juice may be stored for long periods; ReaLemon may last from

[28] In *Cellophane*, the court stated that the competitive market for commodities depends on how different they are from one another in character or use, and "how far buyers will go to substitute one commodity for another." 351 U.S. at 393. It further noted that "[i]t is the variable characteristics of the different flexible wrappings" and the producers' marketing ability that determine choice. *Id.* at 402.

six months to a year if refrigerated. In contrast, fresh lemons are perishable, will spoil within a relatively short time, and must be replenished constantly if used frequently. Other quality differences affecting consumer buying decisions concern taste and decorative uses. Borden's marketing plans recognized that, notwithstanding the convenience and economic factors, it would be difficult to convert many consumers of fresh lemons to ReaLemon because of a strong preference for the taste of fresh lemons. A marketing study done for Borden in 1972 concluded on the basis of interviews with consumers that the chief reason consumers used fresh lemon juice was its superior flavor.[29] Borden's marketing plans also recognized that the presence of chemical additives in ReaLemon distinguished it from fresh lemons. Finally, an obvious difference between fresh lemons and processed lemon juice which affects consumer selection is the ornamental or decorative uses of fresh lemons, such as a lemon wedge for iced tea, a slice of lemon to garnish fish or other dishes, a twist of lemon peel to decorate drinks, and grated lemon peel for recipes. The evidence demonstrated that restaurants commonly use fresh lemons for such purposes, and even consumers of processed lemon juice felt that fresh lemons should be used when entertaining guests. These demonstrated quality differences betwen fresh lemons and processed lemon juice further support the Commission's finding that, considering price, use and quality, fresh lemons were not reasonably interchangeable with processed lemon juice.

In conjunction with the reasonable interchangeability test of *Cellophane*, the Commission applied the submarket test of *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962),[30]

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[29] *See* Finding 19, 92 F.T.C. at 679, and the many comments from consumers quoted therein.

[30] The Court in *Brown Shoe* explained the definition of a submarket as follows:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity

to conclude that processed lemon juice is a valid submarket within which to assess the allegations of the complaint. Borden contends that the Commission erred in applying the *Brown Shoe* test because it relates to relevant markets for Clayton Act anti-merger cases rather than for Sherman Act monopolization cases. Basically Borden maintains that in a proceeding under the more flexible provisions of § 5 of the FTC Act, the Commission may apply only the reasonable interchangeability test of *Cellophane* if the maintenance of unlawful monopoly power is alleged. We reject this contention for two reasons. First, the Commission did not "ignore the dictates of *Cellophane*" and apply exclusively the *Brown Shoe* submarket criteria, as claimed by Borden. On the contrary, the Commission relied on a synthesis of both tests for guidance in determining whether Borden's conduct violated § 5. Second, the Supreme Court has recognized that submarkets, as separate economic entities, may be found in Sherman Act cases as well as Clayton Act cases, and there is "no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 573 (1966). This court has recognized that a submarket analysis may be appropriate in a Sherman Act monopolization case. *Byars* v. *Bluff City News Co., Inc.*, 609 F.2d 843, 859, n. 41 (6th Cir. 1979).[31] We hold that the use of submarket

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of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-595. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. (*Footnotes omitted.*) 370 U.S. at 325.

[31] *See also Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 27 n.11 (3rd Cir.), *cert. denied*, 439 U.S. 876 (1978); *Greyhound Computer Corp.* v. *I.B.M. Corp.*, 559 F.2d 488, 494 n.7 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978);

criteria is appropriate to define the relevant market in the present case dealing with the unlawful maintenance of monopoly power under § 5 of the F.T.C. Act.[32]

Borden further attacks the relevant product market finding of the Commission on the ground that the Commission erred in excluding from the processed lemon juice market lemonade and a lemon-based mixer for cocktails. In arguing that processed lemon juice contains more than the five products included by the Commission in the relevant product market, *supra*, n. 4, Borden questions the credibility of an economist testifying for the FTC, and claims that numerous other witnesses described the competition between processed lemon juice and lemonade. The testimony relied upon by Borden is inconclusive. As to whether reconstituted lemon juice competes with lemonade, one company representative (Kendall, Kendall Foods) stated that it was a very hard relationship to know, and he "just had a feel for it." Another company representative (Wolcott, Seneca Foods) stated he could speak only from his personal use as a consumer as to whether reconstituted lemon juice competes with lemonade. The opinion of a third company representative (Greenburg, Penn Fruit)

Heatransfer Corp. v. *Volkswagenwerk, A.G.*, 553 F.2d 964, 980 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978).

[32] *See L. G. Balfour Co.* v. *F.T.C.*, 442 F.2d 1, 11 (7th Cir. 1971). Apparently Borden does not seriously contest the finding that processed lemon juice is a relevant submarket if the submarket criteria may be applied here, and properly so because substantial evidence supports the Commission's finding that processed lemon juice is a submarket.

In addition to the previously discussed differences in qualities, uses, and prices, the Commission found that industry members recognized the processed lemon juice market as a separate and distinct economic entity. This recognition was reflected in the pricing policies of industry members, their marketing strategies, and the marketing of fresh lemons without regard for the availability of processed lemon juice. Furthermore, there are differences in the production of fresh lemons, which are cleaned and processed as fresh produce, and processed lemon juice, which goes through a manufacturing and bottling process. The channels of distribution are also different, with fresh lemons sold through produce brokers and wholesalers, while processed lemon juice is sold through grocery brokers or salesmen.

was that lemonade competes with reconstituted lemon juice only during the summer months. A fourth representative (Fey, Minute Maid) thought that all lemon-flavored products compete to a certain degree. This contradictory testimony cited by Borden is insufficient to support a conclusion that the Commission's definition of the processed lemon juice market is not supported by substantial evidence.

Furthermore, Borden points to evidence of interchangeability between processed lemon juice and lemonade for only one particular end use, the making of lemonade. It cites no evidence of interchangeability with processed lemon juice for other uses, such as in recipes and iced tea. Similar shortcomings apply to the argument that lemon-based cocktail mixes should be included in the processed lemon juice market. The record viewed as a whole substantially supports the Commission's definition of the processed lemon juice market, and this court concludes that the defined market was appropriate for examining Borden's conduct under § 5.

VI

Having considered the relevant product market, we now must determine whether substantial evidence supported the Commission's finding that Borden possessed monopoly power within the market. The existence of monopoly power may be inferred from a predominant share of the market. *United States* v. *Grinnell*, 384 U.S. 563, 571 (1966). Such an inference, however, "does not have to follow automatically. Only a careful factual analysis of the market in question will reveal whether monopoly power, in fact, exists." *Byars* v. *Bluff City News Co.*, *supra*, 609 F.2d at 850-51. While the Commission stressed Borden's dominant market share, it also relied on several other factors indicating ReaLemon possessed monopoly power within the market.

Borden's market share was substantial, at times amounting to almost 90% of the market nationwide, and over 95% in some

large metropolitan areas. Much of the statistical data used by the Commission in determining market shares came from Borden's own documents and marketing plans.[33] From 1969 through 1974 Borden's national market share ranged from 88% to 75.3% on a liquid volume basis, and from 91.8% to 88.9% on a dollar basis. Borden's 1971 Marketing Plan for ReaLemon estimated its market share at 92%, the 1972 plan estimated 90%, and the 1973 plan put it at 88%. Although these market shares are more than sufficient to infer monopoly power,[34] the Commission looked to other factors evidencing Borden's power to control prices or exclude competitors in the market.

While maintaining a dominant share of the market for extended periods of time, Borden consistently was able to charge a higher price and reap greater profits for ReaLemon than were others marketing processed lemon juice. The Commission found that Borden charged a premium price, sometimes over 30 per cent more than the price of other brands, even

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[33] For example, the 1973 ReaLemon Marketing Plan showed the following market shares on a dollar basis:

	Year Ending 12/25/70	Year Ending 12/24/71	7 Months Ending 8/4/72
REALEMON	91.8	91.4	88.0
GOLDEN CROWN	1.4	2.4	5.5
SENECA	2.0	1.5	1.1
SUNKIST	2.1	1.7	1.4
VITA PAKT	.4	.5	.4
TREESWEET	.5	.4	.4
ALL OTHERS	1.8	2.1	3.2
TOTAL	100.0	100.0	100.0

Borden now claims that this statistical data is unreliable and inaccurate, a position obviously inconsistent with its previous reliance upon this data in formulating its strategy and marketing plans for ReaLemon. ReaLemon management used the market share figures of a recognized and well established independent market research organization. Borden's data on its market share was substantially corroborated by market share figures compiled by complaint counsel from data obtained from firms marketing processed lemon juice. *See* Findings 71-76, 92 F.T.C. at 702-07.

[34] Although the ReaLemon market share showed some decline from 1969 through 1974, this decline is not necessarily inconsistent with a finding of monopoly power. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 794-95 (1946); *Greyhound Computer Corp.*, *supra*, 559 F.2d at 496 n.18.

though no objective differences in quality existed between ReaLemon and any of the other brands of processed lemon juice.[35] ReaLemon's premium price was attributed to successful product differentiation. Witnesses from the industry and grocery business testified that ReaLemon was "almost generic" or "synonymous" with reconstituted lemon juice. Borden maintained this successful product differentiation through extensive advertising: ReaLemon was the only nationally advertised processed lemon juice and was the only significant advertiser in the industry until 1972 when Golden Crown began advertising on a minor scale in selected markets.

A highly successful brand name and product differentiation achieved through extensive advertising over the years, standing alone, does not create a presumption of monopoly power. When a seller possesses an overwhelmingly dominant share of the market, however, and differentiates its product from others through a recognized and extensively advertised brand name, thereby enabling the seller to control prices or unreasonably restrict competition, then monopoly power may be found to exist. Both ReaLemon and its competitors acknowledged ReaLemon's premium price, the need for competitors to price their products low enough to overcome this premium price in order to maintain or increase their market share, and the ability of ReaLemon to preserve its dominant market share through the manipulation of this premium price gap. Through selective promotional allowances Borden could adjust its net wholesale prices to retailers and control price competition at the wholesale level of distribution. The evidence indicated ReaLemon's successfully differentiated brand name, extensive advertising and ability to command a premi-

[35] In the 1972 Marketing Plan, the president of ReaLemon Foods stated that from a technical standpoint, ReaLemon had "no apparent advantage over the juice of any of its competitors. Processed lemon juice is processed lemon juice . . ." Other ReaLemon market plans, actual prices, and market shares support the finding that ReaLemon commanded a premium price for a basically fungible product.

um price also acted to some degree as a barrier to entry into the processed lemon juice market.[36]

The Commission also considered the rate of return on ReaLemon's assets realized by Borden. The total purchase price for ReaLemon in 1962 was $12,370,514, but its adjusted net worth was $2,767,619. The parties characterized the $9,602,895 difference as a discount of future earnings or as a "goodwill" cost. In computing ReaLemon's rate of return on its assets, the ALJ excluded the $9.6 million, but Borden argues it should be considered as an asset. If excluded, ReaLemon's rate of return ranged from 16.9% to 35.2% during 1968-73, nearly four and one-half times the average rate of return for the food and kindred products industries. If included, its rate of return ranged from 8.1% to 10.2% during the same period, about one and one-half times the rate of return for the food and related products industries. Regardless of how the $9.6 million is characterized, Borden's rate of return on ReaLemon's assets supports rather than contradicts the Commission's finding of monopoly power.

A final aspect of Borden's position in the market structure relied on by the Commission was ReaLemon's substantial resource advantage over its competitors. ReaLemon had far greater resources to finance expenditures on advertising.[37] and promotions[38] than did its nearest competitor. It conducted a strong nationwide public relations program and, through other Borden food products, it could participate in tie-in advertising and cross-couponing. The weaker resource bases of ReaLemon's competitors rendered them unable to

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[36] *See* Findings 98-100, 92 F.T.C. 716-18, quoting testimony from economist Dr. Michael Mann and from the presidents of two regional processed lemon juice companies.

[37] The Commission found that ReaLemon spent more than $5,000,000 on advertising between 1969 and 1974. ReaLemon's 1972 Marketing Plan projected its 1971 advertising expenditure at $629,100. In comparison advertising by competing brands in that year was almost non-existent.

[38] For example, ReaLemon's promotion budget for 1973 was $2,805,000. *See* Finding 71, 92 F.T.C. at 715.

engage in such activities. Looking to the evidence as a whole, and in particular to the evidence of Borden's market share combined with its brand name strength, we hold that the Commission's finding of monopoly power is well supported by the record.

VII

We next review the Commission's finding that Borden restrained competition in violation of § 5 of the FTC Act by unlawfully maintaining its monopoly power. Borden's mere possession of lawfully acquired monopoly power in the processed lemon juice market is not per se unlawful. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 62 (1911). One who possesses monopoly power violates the Sherman Act through "the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell*, *supra*, 384 U.S. at 570-71. It is the use of monopoly power to foreclose competition or gain a competitive advantage that is unlawful. *United States* v. *Griffith*, 334 U.S. 100, 107 (1948). Predatory conduct by one possessing monopoly power, such as below-cost pricing or price discrimination, is generally required to find a violation of the Sherman Act. It is not essential to a finding of monopolization, however, that acts or practices used to maintain monopoly power be in themselves independently unlawful. *United States* v. *Griffith*, 334 U.S. at 105; *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 431-32 (2nd Cir. 1945). Nor is it always necessary to find a specific intent to restrain trade or monopolize. *Griffith*, *supra*, 334 U.S. at 105, for a general intent to monopolize is all that is ordinarily required to find a § 2 Sherman Act violation. *Byars* v. *Bluff City News Co., Inc.*, *supra*, 609 F.2d at 859. The Commission found ReaLemon's marketing strategies, pricing, and promotional practices were predatory in nature and evidenced

an intent to maintain its monopoly power unlawfully. These practices included marketing plans implemented to maintain ReaLemon's monopoly power, pricing and promotional allowances without cost justification in selective geographic areas where Borden faced heavy competition, and sales below cost or at unreasonably low prices with the intent to exclude competitors from the market.

In the present case the record contains direct evidence of Borden's general intent to exercise and maintain its monopoly power. ReaLemon's marketing plans for 1971-74 mapped out the actions to be taken to maintain its market share and restrain competition from the expansion of Golden Crown and other competitors.[39] Golden Crown was the first competitor to challenge seriously ReaLemon's market dominance. As previously mentioned, Golden Crown's initial market gains came from the market shares of other competitors more than from ReaLemon's. It is to be reemphasized that it was when Golden Crown began to show successful encroachment on ReaLemon's market share that ReaLemon began to react, as its 1971 Marketing Plan indicates.

The 1971 plan proposed heavy emphasis upon the ReaLemon brand name through advertising, and depended on the strong familiarity with the brand name as a justification for obtaining a higher price. The 1971 plan further proposed to forego price increases planned to offset higher costs, and

[39] Interestingly, Borden attacks the credibility of its own marketing plans and internal documents, contending they are untrustworthy, mere proposals, and not substantial evidence of Borden's actions. This argument might be meritorious if the portion of the marketing plans taken alone and out of context were relied upon as evidence of Borden's intent. *See Timken Roller Bearing Co.* v. *F.T.C.*, 299 F.2d 839, 842 (6th Cir.), *cert. denied*, 371 U.S. 861 (1962). However, other evidence and testimony corroborated the marketing plans and documents, demonstrating that these plans guided ReaLemon's conduct in the market. Nor were the stated intent and objectives of these plans taken out of context. A major theme running throughout them was Borden's intent to use selective price promotions to restrain and discipline vigorous price competition. Finally, the marketing plans cannot be construed as "puffery" meant to impress superiors, for the president of ReaLemon contributed to the plans and they were used by management to direct company sales.

to sacrifice short-term profits to maintain its market share. ReaLemon also switched its method of granting promotional allowances, nearly doubling promotional allowances in geographic areas where competition existed, such as on the East Coast, while limiting promotional allowances in non-competitive areas. A specific objective of the 1972 Marketing Plan was combatting low-priced competition, and the primary weapons were promotional allowances on a selective geographic basis and increased advertising. The promotional allowances brought about reductions in ReaLemon's regular retail price by 10 cents or more per 32-ounce bottle.

The 1973 Marketing Plan was more explicit in stating ReaLemon's intention to maintain its monopoly power over the processed lemon juice market through exclusionary conduct. A major objective of the plan was to raise ReaLemon's market share from an estimated 86.5% nationwide back to 89.0%. This objective was aimed not only at the Golden Crown market share, "but against the share of all brands other than ReaLemon." Again, the main tools for achieving this objective were selective trade deal promotions and substantial advertising, with promotional spending concentrated in heavily competitive markets for the stated purpose of reversing competitive gains. In particular, to combat Golden Crown inroads ReaLemon sought to reduce the price differential through promotional deals.

The last marketing plan relied on by the Commission, the 1974 plan, substantially increased the budget for overall advertising and promotional allowances, but only offered increased promotional allowances in the most competitive geographic areas.[40] A stated objective of the plan was to increase ReaLemon's market share in 4 key districts[41] with high

[40] These greater promotional allowances were granted in the Northeast despite the fact that evidence indicated ReaLemon's manufacturing costs were greater there. The greater promotional allowances could not be attributed to lower distribution costs.

[41] The four key districts listed in the plan were New York, Philadelphia, Chicago, and Detroit.

per capita lemon juice consumption, where Golden Crown had been most successful. The plan noted that these 4 districts accounted for an estimated 54.7% of Golden Crown's sales for 6 months of 1973. The objective of the plan was to reduce Golden Crown's share from 18% to 14% in 1974, and increase ReaLemon's share from 71% to 75%. These 4 areas were selected because they represented areas of high development of Golden Crown, and the plan stated that decreasing Golden Crown's effectiveness in these markets "may result in significant reduction of expansion leverage." Trade deals in these 4 areas were to be continued at high levels, whereas deals in other areas were to be reduced. In addition to these heavy promotions in selected areas, ReaLemon dropped planned price increases in the markets where Golden Crown was competing, but instituted price increases elsewhere. Testimony from ReaLemon's regional sales manager, and internal documents and correspondence from ReaLemon's regional and national sales managers demonstrated that these marketing plans were vigorously implemented, and their purposes and objectives were exactly as stated.[42]

These marketing plans, internal documents, and conduct conforming to the plans provided direct evidence of ReaLemon's intent not only to maintain its monopoly power in the market, but also to increase its market share, reduce the shares of Golden Crown and other competitors, and stifle any further expansion or competitive efforts by Golden Crown. ReaLemon's tactics and conduct went beyond a simple, healthy competitive response by a monopolist to price competition. Rather, they evidenced a concerted effort to restrict competition unreasonably and maintain its monopoly power.

The price reductions and promotional allowances in selected geographic markets enabled Borden to receive monopoly profits in areas of little competition, and then use these profits to subsidize price reductions in areas of intense competition.

[42] *See* quotes from correspondence and reports of ReaLemon's sales managers in Findings 128-30, 92 F.T.C. 729-32.

As the only nationwide distributor of processed lemon juice enjoying strong brand recognition and premium price profits, Borden was in the unique position of being able to withstand extended periods of reduced prices and promotional allowances in selected geographic markets. Thus, Borden's conduct had the effect of deterring entry and restricting the ability of competitors to expand into other geographic areas. These selective geographic promotions were intended to confine and discipline smaller regional distributors because of their vigorous price competition and cannot be characterized as competition on the merits exempt from the proscriptions of § 5 of the FTC Act.

Another finding by the Commission demonstrating Borden's intent to maintain its monopoly power was that Borden sold ReaLemon below cost or at unreasonably low prices in Philadelphia and Buffalo with the effect of injuring competition.[43]

The Commission made reference to the economic definitions of predatory pricing proposed by Professor Richard Posner[44] and Professors Areeda and Turner[45] but did not make a decision as to which rule correctly defines the term. With reference to the Areeda-Turner rule, the Commission said: "It is not necessary to decide whether this is the exclusive, or even the preferred test for predatory pricing. . . . However, the ALJ and the parties both utilized this approach, and we find it a useful one for illuminating the issue."[46]

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[43] The sales in Philadelphia were to Acme Markets, the largest supermarket chain in the city with 20% to 28% of the retail grocery market. The sales in Buffalo were to Niagara Frontier Services, owner of the largest volume supermarkets in the area. Due to limited shelf space and the large promotions offered these customers by Borden, the Commission found that the short-term effect was that they were unable to buy from Borden's competitors.

[44] R. Posner, *Antitrust Law: An Economic Perspective*, 188 (1976).

[45] P. Areeda and D. Turner, ANTITRUST LAW, § 715b (1978); *See also* Areeda and Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975).

[46] 92 F.T.C. 799, n. 29.

Like the Commission, we do not find it necessary to decide which of the two rules, Posner's or Areeda-Turner's,[47] should be applied in the present case in determining whether Borden's pricing was predatory.

This case presents the unique situation of a monopolist marketing a product which could command a premium price,

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[47] Reference is made to an article by Professors Joskow and Klevorick, *A Framework for Analyzing Predatory Policy*, 89 Yale L. J. 213 (1979), proposing a two-tier rule-of-reason approach to determining whether pricing is predatory. They formulate a rule which assesses long-run conditions, for "such an assessment is required because the essence of predatory pricing is the alleged predator's sacrifice of short-run gains for greater long-run gains." *Id.* at 217. The first tier would examine the structural characteristics of the market and the market power of the alleged predator to determine if they generate a reasonable expectation that predatory pricing could occur which would impose significant economic losses on society. Among the structural factors Joskow and Klevorick would consider is the following:

> Second, we should seek to determine whether the existing dominant firm has been successful in establishing a significant "brand preference" in the eyes of consumers, not by producing an objectively better product, but by having been first in the market or by having made extensive "image" advertising expenditures. Faced with such a market, an entrant not only may have to invest the resources that are technically required to establish production and distribution networks but also may have to undertake substantial promotional expenditures, both to get its product known and to overcome brand loyalties that the dominant firm has achieved. In such situations, successful entry will be more costly and more time-consuming, and, as a result, potential competition will be a less effective constraint on the existing dominant firm. As a result, courts should recognize that because generic names and premium brand images induced by advertising change the conditions of entry in such a way that potential competition is a less effective constraint on prices than it otherwise might be, dominant firm behavior in such markets may be worthy of closer scrutiny.

In those cases where the firm and market structural characteristics suggested that efficiency losses are likely to be high if there is a failure to identify pricing which is predatory, then the second tier of the analysis would be applied. *Id.* at 249. This second tier would more closely examine a firm's pricing behavior, and would allow for a more flexible approach in applying the various cost-based rules. The Joskow-Klevorick proposal combines some of the advantages of the *per se* cost-based rules in that it is a workable rule which can be applied by the courts, and some of the advantages of flexibility in the broader Scherer and Posner rules. This article was published after the Commission's opinion was issued.

giving it significant pricing leverage over its competitors. ReaLemon historically has dominated the processed lemon juice market and has affected competition adversely through selective geographic price promotions and unreasonably low prices. The record supports the Commission's conclusion that Borden intended to continue its domination with the same long term effect of reducing or eliminating competition.

We conclude that when a monopolist, through brand identification or otherwise, can and does manipulate prices in such a way as to exclude equally efficient competitors by requiring them to sell below their average variable costs, such price manipulation is an unreasonable use of power to maintain the monopolist's market position. The record supports the conclusion that Borden is a monopolist and undertook these actions. Accordingly, the Commission was authorized to hold that these actions violate the Sherman Act § 2 and the FTC Act § 5.

VIII

The final issue raised in Borden's petition concerns the propriety of the Commission's cease and desist order. Borden alleges that the order amounts to an absolute ban against selective price reductions in response to competition, and therefore deprives Borden of the "meeting competition" defense to which it is entitled. Additionally, Borden alleges that the prohibition on sales below cost, or at unreasonably low prices which have the effect of hindering or restraining competition, is too vague and unenforceable. Respondent F.T.C. replies that the order need not provide a "meeting competition" defense under the Robinson-Patman Act where Borden was guilty of monopolizing, for a monopolist may be found to have violated § 2 of the Sherman Act whether or not a Robinson-Patman violation is established. Finally, the F.T.C. responds that the order is as specific as the circumstances

permit, and sufficiently clear to avoid raising serious questions as to its meaning and application.[48]

The Commisison has wide discretion in determining the kind of order necessary to cope with the unfair practices found. *F.T.C.* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965); *F.T.C.* v. *National Lead Co.*, 352 U.S. 419, 428 (1957).[49] Because Congress has placed upon the Commission the primary responsibility for shaping remedies, the courts should not "lightly modify" the Commission's order. *F.T.C.* v. *Colgate-Palmolive Co.*, *supra*, 380 U.S. at 392. The courts should "interfere only where there is no reasonable relation between the remedy and the violation." *Atlantic Refining Co.* v. *F.T.C.*, 381 U.S. 357, 377 (1965); *P. F. Collier & Son* v. *F.T.C.*, 427 F.2d 261, 276 (6th Cir.), *cert. denied*, 400 U.S. 926 (1970).

The first paragraph of the Commission's order prohibiting any price discrimination, not justified by cost differentials, in any geographic area that adversely affects competition, is reasonably related to Borden's unlawful conduct which the Commission has sought to curtail. As stated earlier, Borden's selective geographic promotions and price cuts were its primary tools in hindering competition from smaller regional competitors. No other competing processed lemon juice had the broad national base of Borden, or the ability to remain competitive in the face of Borden's sustained price reductions and promotions in a particular market area. The Commission noted the long-run anti-competitive consequences of this con-

[48] The F.T.C. also argues that Borden failed to object to the remedies before the Commission, and raises these objections for the first time in this Court. It appears that the objections in issue were at least indirectly raised before the Commission, and they have been considered by this Court.

[49] This wide latitude is based on the Commission's "expertise in determining what is necessary to eliminate unfair practices and its administrative responsibilities to devise remedies according to a consistent statutory policy." *Standard Oil Co. of Cal.* v. *F.T.C.*, 577 F.2d 653, 662 (9th Cir. 1978).

duct to consumers, in that once Borden eliminates the threat of entry from a regional competitor or disciplines a competitor to cease its price competition, Borden may recoup its short-term reduced profits or losses by raising prices back to monopolistic levels. Borden thus would be able to maintain its monopoly power and consumers would be left with a limited selection and high monopoly prices. The Commission's remedy prohibiting these selective geographic price reductions and promotions unless cost-justified is a reasonable means of stopping Borden's unlawful conduct.

We disagree with Borden's contention that the order improperly denies it the "meeting competition" defense. Under the order, Borden still may make overall price reductions to meet competition in particular geographic areas. Additionally, it is well established that the Commission "has the authority to restrict otherwise lawful practices and activities when they are likely to be used to carry out an unlawful purpose." *Arthur Murray Studio of Washington, Inc.* v. *F.T.C.*, 458 F. 2d 622, 625 (5th Cir. 1972). See also *F.T.C.* v. *National Lead Co.*, *supra*, 352 U.S. at 430; *American Cyanamid Company*, *supra*, 363 F.2d at 771; *Sandura Co.* v. *F.T.C.*, 339 F.2d 847, 861 (6th Cir. 1964). The Commission "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *F.T.C.* v. *National Lead*, *supra*, 452 U.S. at 429. The prohibited goal was Borden's unlawful maintenance of its monopoly power. To permit it to reduce prices in competition with smaller regional sellers while maintaining high monopoly prices and profits elsewhere, would be to permit the very practice used to carry out its unlawful purpose. The F.T.C. had the authority to restrict this practice, even though it might otherwise be lawful.

Finally, Borden alleges the order is so vague as to be unenforceable. Borden focuses solely on the language prohibiting ReaLemon from selling "below its cost or at unreasonably low prices." In this regard, the Supreme Court has said an

F.T.C. order must be "sufficiently clear and precise to avoid raising serious questions as to [its] meaning and application." *F.T.C.* v. *Colgate-Palmolive Co., supra*, 380 U.S. at 392. When considered in the context of the complaint and opinion from which it arose, the language to which Borden refers is sufficiently clear and precise.[50]

The prohibition against selling "below its cost" refers to selling below ReaLemon's average total cost, and "unreasonably low prices" refers to sales made at or near average costs with the intent to restrain unreasonably competition from Golden Crown and others, as the opinion clearly demonstrates.[51] The Commission explained in the remedy portion of its opinion that "whether a price is 'unreasonably low' must be determined by reference to Borden's own costs, its awareness of its competitors' costs, historic price differentials, and competitive conditions in the market."[52] With such knowledge, Borden can determine whether its pricing policies will put it in a zone of danger with respect to the FTC ruling. Accordingly, the onus of compliance is in its proper place.

We affirm and enforce the Commission's order.

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[50] Although the order is sufficiently precise, Borden may still take advantage of the Commission's procedures for advising a respondent whether its proposed conduct violates the order. Concern that hypothetical conduct might violate the order is an insufficient reason for modification. *See F.T.C.* v. *National Lead Co., supra*, 352 U.S. at 431; *Luria Brothers & Co.* v. *F.T.C., supra*, 389 F.2d 847, 862 (3rd Cir.), *cert. den.*, 393 U.S. 829 (1968).

[51] *See* 92 F.T.C. at 800-01, 804-05.

[52] 92 F.T.C. at 807 n.41.

KENNEDY, Circuit Judge, dissenting. The majority affirms the FTC's ruling that Borden engaged in monopolization in violation of section 2 of the Sherman Antitrust Act. I respectfully dissent.

Although all reconstituted lemon juice is chemically alike, the FTC found that a strong consumer preference existed for Borden's ReaLemon brand because Borden successfully differentiated ReaLemon from other brands in the minds of consumers through heavy promotion of the ReaLemon trademark. *Borden, Inc.*, [1976-1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 21,490 at p. 21,496. The FTC found that the consumer preference enabled Borden to charge significantly more for ReaLemon than consumers were willing to pay for competing products.[1] *Id.* It also found that Borden had monopoly power in the reconstituted lemon juice market. *Id.* at 21,501-21,503.

ReaLemon faced increased competition in the late 1960's. The FTC found that Borden deliberately set out to defeat this competition, to maintain or increase its market share. *Id.* at 21,504-21,505. In furtherance of this goal Borden promoted the ReaLemon brand even more heavily. The Commission found that Borden also priced ReaLemon at or near its costs. Because of the price premium ReaLemon commanded — created by the consumer preference — Borden's competitors were forced to price their competing products below their own costs. The FTC called this "unreasonably low" pricing. *Id.* at 21,511, together with 21,509-21,510. The Commission found that Borden practiced such unreasonably low pricing only in those markets where competition was stiff.

The FTC concluded that under section 2 of the Sherman Act a monopolist may only maintain its power through means

[1] The Commission heavily relied on its finding that competitors would have to sell at a price well below that of ReaLemon in order to compete. [1976-1979 Transfer Binder] Trade Reg. Rep. (CCH) at 21,507-21,508; 21,510. This finding is a little hard to accept, in view of the fact that one of Borden's most successful competitors, Minute Maid, apparently charged significantly more for its product than Borden did for ReaLemon.

that are "economically inevitable." *Id.* at 21,504, 21,508, 21,510. It ruled that Borden's selective unreasonably low pricing in a deliberate attempt to maintain or increase its market share constituted monopolization under section 2, and thereby violated section 5 of the FTC Act. *Id.* at 21,510. The majority upholds this ruling. In addition to the grounds relied on by the Commission, the majority relies on alleged below cost sales by Borden and states that Borden used its monopoly profits in markets where it faced little competition to subsidize price reductions in markets where the competition was stiff. Majority op. at 26-27. One cannot tell from the majority's opinion the relative importance of any one of these grounds for its holding.

Although it upholds the Commission's result the majority does not adopt the Commission's definition of monopolization as competitive conduct by a monopolist that is not "economically inevitable." Rather, as the majority recognizes, the otherwise lawful conduct forbidden by section 2 of the Sherman Act is a monopolist's use of *monopoly* power in order to maintain or improve its position in the market. *United States* v. *Griffith*, 334 U.S. 100, 107 (1948); *Telex Corp.* v. *International Business Machines Corp.*, 510 F.2d 894, 926-927 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); majority op. at 23 (emphasis added). Not every exercise of market power by a monopolist is a use of monopoly power. Monopoly power is power that a firm possesses by virtue of its monopoly position in the market, not power that it has because of, for instance a superior product. A use of monopoly power that is unreasonably anti-competitive violates the Sherman Act. *See Byars* v. *Bluff City News Co.*, 609 F.2d 843, 853 (6th Cir. 1979). However, growth or development as a consequence of a superior product, business acumen, or historic accident, even by a monopolist, does not violate the Act. *United States* v. *Grinnell*, 384 U.S. 563, 570-571 (1966).

Since monopolization is the unreasonably anti-competitive use of monopoly power, the only intent that could be relevant

to a charge of monopolization is an intent to use monopoly power in an unreasonably anti-competitive manner. There is no proof that Borden had such an intent here. Borden surely meant to obtain as much of the reconstituted lemon juice market as it could, but that is the very essence of normal competition, a goal that we approve even for a monopolist. Despite the majority's assertion to the contrary this *is* simple, healthy competition. The alternative is that Borden must have intended not to respond when its market share began to disappear, but not even a monopolist need act so irrationally. *See Telex* v. *IBM, supra.*

Borden meant to accomplish its marketing goals through extensive advertising and promotions. Advertising is not a use of monopoly power. Successfully promoting one's product is the epitome of the "business acumen" that *Grinnell* states is *not* monopolization. Nor is any monopolization shown by Borden's selective price reductions where there is no finding that the discriminatory pricing violated the Robinson-Patman Act or resulted in Borden's not making a profit. It is simply good business practice, not a use of monopoly power, to lower prices only where the competition is stiff. *See California Computer Products* v. *International Business Machines Corp.*, 613 F.2d 727, 742-743 (9th Cir. 1979) ("business acumen" includes shrewdness in profitable price competition, which is pricing above average variable cost; the Sherman Act does not distinguish competition on the basis of price and of performance).

The use of monopoly profits derived in one market to subsidize competition in another market, on the other hand, is an unreasonably anti-competitive use of monopoly power. Had the Commission rested its decision here on a finding that Borden used its monopoly profits from some geographic markets to finance the fight against competition in others, there was evidence which might have supported such a Commission decision. However, the FTC found Borden in violation of section 2 because it charged "unreasonably low"

prices, and it defined unreasonably low prices as prices so low that the preference for ReaLemon forced competitors to sell at a loss. The Commission expressly stated that a monopolist with an image advantage may not cut prices to eliminate competitors, thus requiring Borden to engage in umbrella pricing, or pricing above cost to protect competitors.[2] The Commission did not ground its decision on any *below* cost pricing or improper use of monopoly profits.[3] Borden's forcing

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[2] The Commission adopted the analysis of Professor Scherer, who "find[s] it hard to avoid a value judgment that temporary price cutting to eliminate producers handicapped only by an inferior brand image is socially undesirable." Scherer, "Predatory Pricing and the Sherman Act: A Comment," 89 Harv. L. Rev. 869, 889 (1976). [1976-1979 Transfer Binder] Trade Reg. Rep. (CCH) at 21,509. This is indeed a value judgment, and it has nothing to do with the "use of monopoly power" that section 2 reaches. Whether I agree or disagree with Professor Scherer's value judgment, it has no place here. Despite a rather general assumption to the contrary, section 2 of the Sherman Act is not a license for the courts or the FTC to choose among competing economic theories of the social good and to impose their own ideas of wise economic policy. That is the task of Congress, or arguably the FTC acting as a rule maker under the FTC Act. While broad, the definition of monopolization in section 2 is not quite that broad.

[3] The FTC did note that Borden "apparently" made some sales of ReaLemon at prices that were below its average total costs, after agreeing with the ALJ that Borden did not price ReaLemon below average *variable* cost. [1976-1979 Transfer Binder] Trade Reg. Rep. (CCH) at 21,507. Professors Areeda and Turner would find a monopolist that prices its products above average variable cost not guilty of monopolization. Areeda & Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act," 88 Harv. L. Rev. 697 (1975). Professor Posner would instead find a violation of the Sherman Act when a monopolist sells below average total cost. Posner, *Antitrust Law: An Economic Perspective* 188 (1976). The FTC expressly refused to decide whether Posner or Areeda/Turner correctly defined those pricing practices that constitute monopolization. [1976-1979 Transfer Binder] Trade Reg. Rep. (CCH) at 21,506 n.29. This is understandable since the Commission was concerned with manipulation of a price premium, not below cost pricing.

Absent a decision by the Commission that pricing below average total cost violates section 2 of the Sherman Act, the fact that Borden might have engaged in such pricing has no relevance to this case except, as the Commission used it, to show that Borden's prices were low. This Court cannot take judicial notice that Posner's and not some other economic theory correctly defines the use of monopoly power. In fact, the majority expressly refuses to make such a finding. Thus, the existence of pricing below average total cost does not support the majority's decision.

The Commission also stated parenthetically that Borden subsidized its price cuts in part with continued monopoly pricing elsewhere. *Id.*

its competitors to sell at a loss was certainly the paramount if not the only basis for the Commission's decision, and it is the basis the Commission gives for its decision that we must review on appeal. *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943); majority op. at 11. Accordingly, any discussion of below cost sales or use of monopoly profits to subsidize low prices has no place in our review of the case.

On the merits of the decision the FTC did make, neither the majority nor the FTC ever explain why a monopolist may not use consumer preference to its competitive advantage or how this is a use of monopoly power. The majority simply asserts, as did the Commission, that Borden's manipulation of its price premium harmed competition. However, it is the *use* of *monopoly* power, not just an effect on competition or competitive activity by a monopolist, that section 2 prohibits.

The price premium did not exist because of the monopoly. It was nothing more than evidence of a consumer preference for ReaLemon. The preference was created in part by the ReaLemon trademark and in part by successful advertising. The trademark was lawfully acquired by Borden and is protected by federal law. 15 U.S.C. § 1114. Manipulation of a consumer preference is not a use of monopoly power unless the preference was created somehow by the monopoly position in the market, and there is no such finding here. *But, see* Scherer, "The Posnerian Harvest: Separating Wheat from Chaff," 86 Yale L.J. 974, 998 (1977).[4] It is not a violation of

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at 21,508. This statement was made as an aside during the Commission's discussion of Borden's manipulation of its price premium. The statement would only be true if Posner's definition of predatory pricing were adopted. Since the Commission did not decide that Posner correctly defined pricing that constitutes a use of monopoly power there is no support for its statement that Borden used its monopoly profits to subsidize the fight against competition. The Commission's offhand statement cannot be the basis for a finding of monopolization.

[4] The majority cites with approval Joskow and Klevorick, "A Framework for Analyzing Predatory Policy," 89 Yale L.J. 213 (1979). Like Professor Scherer, these commentators would subject the com-

the antitrust laws for a monopolist to take advantage of a consumer preference at the expense of its competitors.[5]

The majority may be reasoning that the lawful conduct forbidden by section 2 of the Sherman Act extends beyond a monopolist's unreasonable use of monopoly power to include the use of any market power. The majority opinion is a little ambiguous on this point. If this is the basis of its decision, I think the majority errs in extending the Sherman Act to the otherwise lawful use of market power that is not monopoly power. However, even under this broader test, there is nothing unreasonable about a monopolist's using its image advantage to its benefit.

Because I think the FTC was wrong to premise a violation of section 2 on Borden's manipulation of its price premium, I would not affirm its decision. I would remand instead for the FTC to decide whether Borden did use monopoly profits from some markets to subsidize competition in other markets.

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petitive use of an irrational price premium to scrutiny under section 2. Again, like Professor Scherer, their reasons for doing so focus solely on the effect of such a brand preference on competition. As set out below, n.5, I do not believe that it is the function of the FTC to decide which consumer preferences are "rational" and which "irrational." However, the fatal flaw I see in Poskow and Klevorick's analysis is that it ignores the complete legitimacy of a brand preference created by advertising or by being first in the market. This is "business acumen," and its use to affect competition is not forbidden by section 2 of the Sherman Act.

[5] The FTC disapproved of the consumer preference for ReaLemon because it resulted from a "spurious" product differentiation based on the strength of the ReaLemon trademark. [1976-1979 Transfer Binder] Trade Reg. Rep. (CCH) at 21,509-21,510. The FTC concluded that there was no rational reason for consumers to pay a premium for the ReaLemon brand name since the product is chemically indistinguishable from other brands of reconstituted lemon juice. *Id.* at 21,508, 21,510. I strongly disagree. The primary function of a brand name is to provide consumers an assurance of quality. It is quite rational for consumers to pay extra for ReaLemon to minimize their risk of receiving inferior goods. Should any proof that this is rational be necessary this case provides a prime example. Borden's principal competitor and the complaining party before the Commission was Golden Crown. The ALJ found and the Commission appears to agree that Golden Crown sold an adulterated product. *Id.* at 21,501 n.16.

IN THE MATTER OF

BORDEN, INC.

FINAL ORDER, OPINIONS, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8978. Complaint, July 2, 1974 — Decision, Nov. 7, 1978

OPINION OF THE COMMISSION

BY PERTSCHUK, *Commissioner:*

The complaint in this proceeding, issued in July 1974, charged Borden, Inc., through ReaLemon Foods, a unit of its Borden Foods division, with unlawfully maintaining monopoly power in the production, distribution and sale of reconstituted lemon juice in the United States. On August 19, 1976, after extensive hearings, Administrative Law Judge ("ALJ") Daniel H. Hanscom issued an initial decision sustaining the complaint, from which Borden has appealed.

The initial decision contains a comprehensive and cogent review of the evidence, in far greater detail than this opinion will permit. The ALJ's order contained several conduct provisions ordering Borden to

cease and desist from certain pricing and promotional practices. Borden was also required, for a period of 10 years, to grant a license for the use of the "ReaLemon" name and label design to any person engaged in or wishing to enter the business of producing and marketing processed lemon juice.

Judge Hanscom found that Borden possessed monopoly power in the production, marketing, and sale of processed lemon juice in the United States, which he found to be the relevant market for analytical purposes. He also found that Borden had unlawfully maintained its monopoly power through a variety of acts and practices. Since the [2] dominance of the "ReaLemon" brand was found to be "the heart of the monopoly power" possessed and preserved by Borden, Judge Hanscom found it necessary to go beyond ordinary cease-and-desist relief and to order compulsory licensing of the "ReaLemon" trademark and label design in order to dissipate Borden's monopoly power and restore competition to the processed lemon juice market.

On appeal, Borden attacks the ALJ's conclusions with regard to the definition of the relevant market, Borden's possession and unlawful maintenance of monopoly power, and the Commission's power to order compulsory licensing of the "ReaLemon" trademark.[1] We affirm the ALJ's conclusions on the liability issues. However, we feel that an appropriately crafted conduct order should permit competition to flourish in the processed lemon juice market, and thus find it unnecessary to reach the question of trademark relief.[2]

The Processed Lemon Juice Industry

In the 1930's Irvin Swartzberg founded the ReaLemon business when he began selling pre-squeezed lemon juice in bottles to bars, hotels and other institutional customers (Tr. 2972-73).[3] The product's original attraction was [3] its convenience, as compared with squeezing fresh lemons. Over the years, ReaLemon began selling its juice directly to consumers, and also changed the composition of the

[1] The United States Department of Commerce and the United States Trademark Association, a non-profit association of businesses, filed *amicus curiae* briefs supporting Borden's position on the trademark licensing issue.

[2] Chairman Pertschuk disagrees with the majority on this issue, as elaborated in his separate opinion on relief.

[3] The following abbreviations are used herein:

ID	Initial Decision (Finding No.)
ID p.	Initial Decision (Page No.)
Tr.	Transcript of Testimony, Page No.
CX	Complaint Counsel's Exhibit No.
RX	Respondent's Exhibit No.
RAB	Respondent's Appeal Brief, Page No.
CAB	Complaint Counsel's Answering Brief, Page No.
RRB	Respondent's Reply Brief, Page No.
RPF	Respondent's Proposed Findings of Fact and Conclusions of Law, Finding No.

product from pre-squeezed fresh lemon juice to a reconstituted product made from lemon juice concentrate, water, and a preservative (ID 9). In the early 1940's the company began to use the "ReaLemon" trademark in connection with its product, and in the ensuing years heavily advertised and promoted ReaLemon brand reconstituted lemon juice. In fact, for years prior to the 1970's ReaLemon was the only nationally advertised and distributed brand of processed lemon juice. In 1962, Borden, Inc., purchased the ReaLemon-Puritan Co. for approximately $12.4 million. In 1973, Borden's sales of ReaLemon reconstituted lemon juice amounted to $22 million, out of total corporate sales of over $2 billion.

Reconstituted lemon juice is used primarily as an ingredient in tea, lemonade, and other foods and beverages. Among the features ReaLemon has stressed in its promotions are the convenience, economy, and shelf life of reconstituted lemon juice.

Processed lemon juice is not difficult to manufacture (ID 9 and p. 166). The raw materials are readily available, although there have been times when lemon juice concentrate has been on allocation. There are no secret formulas or processes involved, and the product can be produced using relatively inexpensive equipment. Any plant which bottles other juices can pack processed lemon juice and, in fact, two of the facilities at which Borden bottles ReaLemon are used to pack other Borden products.

Since its introduction into the market, ReaLemon has dominated the processed lemon juice industry. Sunkist, which is the leading supplier of lemons and lemon juice concentrate to the industry, was once a national competitor, but substantially retrenched in the late 1950's and early 1960's (Tr. 681–82). Other competitors have generally distributed their products only on a local or regional basis (ID 102), and have frequently encountered difficulty in holding on to customers.

As the ensuing discussion will show in greater detail, the primary reason for ReaLemon's longstanding dominance of the processed lemon juice market has been its successful [4] product differentiation. The heavy promotion of the ReaLemon brand has created a strong consumer "franchise" whereby consumers typically associate the name "ReaLemon" with the processed lemon juice product. This product differentiation is artificial in the sense that it cannot be attributed to any superior qualities of ReaLemon.

Product differentiation is critical to this case in two respects: (1) it enabled Borden to price its product at a level substantially above that at which other brands could be sold; (2) it gave Borden an

instrumentality that it could use to prevent competitors from obtaining a secure position in the market.

I. RELEVANT MARKET

In determining whether respondent maintains monopoly power over the marketing and sale of processed lemon juice, our analysis begins with the delineation of the market or "part of commerce" in which it allegedly possesses monopoly power. *United States* v. *E.I. duPont de Nemours & Co.*, 351 U.S. 377, 380 (1956) ("*Cellophane*").[4] The parties are agreed that the relevant geographic market is the United States as a whole, but are in sharp dispute as to the appropriate product market. Judge Hanscom determined that although the outer boundaries of a broad product market may include fresh lemons, processed lemon juice constitutes a valid submarket within which to test the allegations of the complaint.[5] Borden argues that the ALJ erroneously employed submarket analysis in a monopolization case, and that if the appropriate legal standard were applied, processed lemon juice could not be found to be a market separate and apart from fresh lemons. [5]

A. Legal Standard

Judge Hanscom found that processed lemon juice constitutes "at the least, a valid submarket for antitrust purposes" (ID, p. 142), and concluded that it belonged "in a separate market or submarket from fresh lemons" (ID, p. 148). It is respondent's contention that submarket analysis, which originally developed as a part of the law of mergers, is not appropriate in a monopolization case.

The *Cellophane* case was the Supreme Court's first attempt to provide an analytical framework for definition of relevant markets in antitrust cases. There, the Court delineated the relevant product market within which to test the claim that duPont had monopolized trade in violation of Section 2 as embracing not merely cellophane, of which duPont controlled almost a 75 percent share, but rather all flexible packaging materials, of which duPont's share was under 20 percent. The Court said:

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[4] Although this case was brought and is decided under Section 5 of the FTC Act, it sounds basically in monopolization. Accordingly, the law under Section 2 of the Sherman Act is used to provide guidance for the application of Section 5, both as to the issue of market definition and the substantive standard of illegality. It is clear that conduct constituting monopolization under Section 2 also violates Section 5. See *L.G. Balfour Co.* v. *FTC*, 442 F.2d 1, 9 (7th Cir. 1971); cf. *FTC* v. *Cement Institute*, 333 U.S. 683 (1948). In relying on the law of Section 2, however, we in no way intimate that the scope of Section 5 is bounded by the scope of Section 2.

[5] Although the complaint alleged reconstituted lemon juice to be the relevant product market, complaint counsel in their pretrial brief shifted the focus of the proceeding to processed lemon juice, which is a slightly broader market consisting of frozen reconstituted lemon juice, processed fresh lemon juice, frozen fresh lemon juice, and imitation lemon juice in addition to the bottled reconstituted variety (ID 8).

> In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce," monopolization of which may be illegal.

351 U.S. at 395. If price changes in one product materially affect the sales of another, such responsiveness, or cross-elasticity of demand, suggests that the products in question should be treated as being part of the same market. *Id.* at 400. Respondent argues, on the basis of the *Cellophane* standard, that the relevant product market in this proceeding "must be nothing less inclusive than the total 'lemon juice' market," including both bottled lemon juice and the juice of fresh lemons (RAB 19).

Six years after the *Cellophane* decision, the Supreme Court elaborated on the appropriate test for market definition in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962). The Court stated: [6]

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.

Id. at 325. The Court then described the criteria to be applied in determining the existence of submarkets:

> The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Id.

We cannot accept respondent's view that the *Brown Shoe* submarket criteria, by now well established in the law, are of no relevance in this proceeding. The *Brown Shoe* formulation reflects a synthesis of the "reasonable interchangeability" test of *Cellophane* and the "peculiar characteristics and uses" standard employed in *United States* v. *E.I. duPont de Nemours & Co.*, 353 U.S. 586, 593-94 (1957) ("*General Motors*"). Cf. *Sargent-Welch Scientific Co.* v. *Ventron Corp.*, 567 F.2d 701, 710 (7th Cir. 1977), petition for cert. filed, 46 U.S.L.W. 3695 (U.S. May 1, 1978)(No. 77-1566). Thus the same market analysis must be undertaken in actions charging violation of the antimonopoly provisions of the Sherman Act as in actions charging violation of the antimerger provisions of the Clayton Act. See *e.g.*, *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264, 1271 (9th Cir. 1975)

In *United States* v. *Grinnell Corp.*, 384 U.S. 563, 573 (1966), the Supreme Court observed that there is "no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of [7] the Sherman Act."[6] This view was adopted by the Seventh Circuit in *L.G. Balfour Co.* v. *FTC*, 442 F.2d 1, 11 (7th Cir. 1971), which expressly held that submarket criteria may appropriately be used to define the relevant market in a monopolization case arising under Section 5 of the FTC Act. Citing *Grinnell*, the court noted that

> [N]o policies have been proffered by petitioners to show why the submarket analysis of Section 7 should not also be applicable to Section 2 cases. The ultimate objective of the criteria is to delineate markets which conform to areas of effective competition and to the realities of competitive practice.[7]

Id. A number of recent Sherman Act cases discussing the issue have recognized the propriety of using submarket analysis in a monopolization case. See, *e.g.*, *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.*, 1978-1 Trade Cas. ¶62,064, at 74,623-24 (3d Cir. May 24, 1978); *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488, 494 n.7 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *Cass Student Advertising, Inc.* v. *National Educational Advertising Service, Inc.*, 516 F.2d 1092, 1094-95 (7th Cir.), *cert. denied*, 423 U.S. 986 (1975); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547, 552-54 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F.2d 449, 454-55 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967); cf. *Heatransfer* [8] *Corp.* v. *Volkswagenwerk, A.G.*, 553 F.2d 964, 980 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978); *Sargent-Welch Scientific Co.* v. *Ventron Corp.*, *supra*, 567 F.2d at 710-11; *United States* v. *Empire Gas Corp.*, 537 F.2d 296, 304 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977). But cf. *United States* v. *Mrs. Smith's Pie Co.*, 440 F. Supp. 220, 230 (E.D. Pa. 1976).

Thus, we believe it is well settled that the same standard for delineation of the relevant market may be applied in cases whether they are brought under the Sherman, Clayton, or Federal Trade

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[6] What was made explicit in *Grinnell* — that "[i]n §2 cases under the Sherman Act, as in §7 cases under the Clayton Act . . . there may be submarkets that are separate economic entities," 384 U.S. at 572, — was intimated prior to *Brown Shoe* in *International Boxing Club, Inc.* v. *United States*, 358 U.S. 242 (1959), a monopolization case. Applying the reasonable interchangeability test enunciated in *Cellophane*, the Court concluded that championship boxing "is a sufficiently separate part of the trade or commerce to constitute the relevant market for Sherman Act purposes." *Id.* at 252. In language that bridges the apparent differences in the language of *Cellophane* and *General Motors*, the Court determined that "[b]y analogy [championship boxing] bears those sufficiently 'peculiar characteristics' found in automobile fabrics and finishes such as to bring them within the Clayton Act's 'line of commerce' [citing *General Motors*]." *Id.* at 252 n.8. See also *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960).

[7] The court also observed in this connection that "the Commission under Section 5 is not bound to follow antitrust standards as strictly as the courts must under the Sherman and Clayton Acts." 442 F.2d at 11.

Commission Acts. See *Luria Bros. & Co.*, 62 F.T.C. 243, 604 (1963), *aff'd*, 389 F.2d 847 (3d Cir.), *cert. denied*, 393 U.S. 829 (1968); cf. *L.G. Balfour Co.* v. *FTC*, *supra*, 442 F.2d at 11; *Columbia Broadcasting System, Inc.* v. *FTC*, 414 F.2d 974, 978-79 (7th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970).

B. Application of Submarket Criteria

On the basis of the *Brown Shoe* criteria, the administrative law judge determined that processed lemon juice was a valid submarket within which to test the allegations of the complaint. After an examination of the record in light of the relevant criteria we agree with the ALJ's conclusion.

1. *Unique Characteristics*

Although it is true that consumers *can* substitute fresh lemons for processed lemon juice (and vice versa) in some and uses-that is, there is some functional interchangeability between the two products - unique taste and convenience factors substantially differentiate processed lemon juice from fresh lemons.[8] Cf. *United States* v. *Grinnell Corp.*, *supra*, 384 U.S. at 573-74; *SmithKline Corp.* v. *Eli Lilly & Co.*, 427 F. Supp. 1089, 1116-18 (E.D. Pa. 1976), *aff'd*, 1978-1 Trade Cas. ¶62,007 (3d Cir. April 3, 1978), petition for cert. filed, 47 U.S.L.W. 3009 (U.S. June 30, 1978) (No. 77-1869); *United States* v. *Lever Bros. Co.*, 216 F. Supp. 887, 891 (S.D.N.Y. 1963); *United States* v. *Mrs. Smith's Pie Co.*, *supra*, 440 F. Supp. at 228; *Union Carbide Corp.*, 59 F.T.C. 614, 653 (1961). Because the processed juice can be stored for longer periods without spoilage (Tr. 980-81, 1202-03, 2630) and, as stressed in ReaLemon promotions (RX 196; RX 203; RX 546, p. 6), can be ready for use without preparation, it has been generally recognized by consumers as a convenience product (CX 2, p. 673). The superior taste and palatability of the fresh [9] juice has been recognized by consumers (CX 286, pp. 16-18) and industry (Tr. 3969) alike. This is attributable partly to the presence in processed juice of sulfur dioxide, which is used as an additive to prevent spoilage (CX 2, p. 674). Because of substantial differences in palatability, many consumers will use the processed variety for general family needs, but reserve the fresh juice for special occasions (Tr. 5025; CX 286, p. 22). Others will do entirely without lemon juice if the fresh variety is unavailable (CX 286, p. 27).

Respondent's experts relied on statistical data comparing the

[8] Some degree of interchangeability does not, by itself, rebut the existence of submarkets. See, e.g., *General Foods Corp.* v. *FTC*, 386 F.2d 936, 940 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968).

usage patterns and user profiles of fresh lemons and processed lemon juice in concluding that the two products competed in the same relevant market (RX 318-29; Tr. 5144-45, 5755).[9] However, we agree with complaint counsel's expert (Tr. 6127-29) that it is impossible to determine the extent of competition between the two products from the mere tabulation of similar uses and demographic data regarding users of the two products.[10]

2. *Industry and Public Recognition*

The recognition of separate markets or submarkets by industry members has been identified as an important factor in market analysis. See, *e.g., General Foods Corp.* v. *FTC*, 386 F.2d 936, 941 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968). Identifying what firms and what products a particular company views as competitors, both in general corporate decision-making and, in particular, in making pricing decisions, is an important indicium of industry recognition of the bounds of the market. *Id.* See also *Abex Corp.* v. *FTC*, 420 F.2d 928, 930-31 (6th Cir.), *cert. denied*, 400 U.S. 865 (1970); *General Foods, supra*, at 941; *United States* v. *Pennzoil Co.*, 252 F. Supp. 962, 972 (W.D. Pa. 1965). The extent to which industry members recognize other products as exerting competitive influences on them has a direct bearing on the existence and degree of competition. [10]

There is considerable record evidence of respondent's recognition of the processed lemon juice market as a separate and distinct economic entity. Although one objective of respondent's advertising strategies was enlargement of the processed lemon juice market by the conversion of fresh conclusion users to ReaLemon (*e.g.*, CX 3, p. 788), on a day-to-day basis price promotional activities were aimed at the low-priced competition posed by other manufacturers of processed lemon juice (*e.g.*, CX 1, p. 656; CX 2, p. 700; CX 3, p. 792). Respondent's Marketing Plans calculated ReaLemon's market share on the basis of all manufacturers of processed lemon juice, without reference to fresh lemon sales. (CX 1, pp. 639-40; CX 2, p. 669, CX 3, pp. 790-91; CX 4, pp. 853-55). Respondent's assertion that the competitive market includes fresh lemons is further belied by the testimony of the President of the ReaLemon Foods Division, who stated that on a day-to-day basis the concern was with other

[9] Similar statistical data collected by the same organization were held to be unpersuasive in establishing frozen dessert pies to be in the same market as other dessert products in *United States* v. *Mrs. Smith's Pie Co.*, *supra*, 440 F. Supp. 229, 236-37 (E.D. Pa. 1977).

[10] In *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 275 (1964) ("*Alcoa-Rome*"), the fact that insulated copper conductor comprised 22.8 percent of the gross additions to insulated overhead distribution lines, which was the most important end use for insulated aluminum conductor, did not preclude placing the two products in separate submarkets.

manufacturers of processed juice (Tr. 1783). Moreover, correspondence in respondent's own files by and between ReaLemon, Borden, salesmen, and brokers relating to competitive conditions discussed conditions in the processed lemon juice market only. See CX 81.

The evidence shows that other manufacturers of processed lemon juice structured their prices in relation to ReaLemon, and not to fresh lemons (*e.g.*, Tr. 158–89, 546–47, 686–87). In making decisions on purchases of the processed variety, retail grocery buyers did not consider either the price or movement of fresh lemons (*e.g.*, Tr. 1963, 974). Similarly, the Lemon Administrative Committee, which operates under the supervision of the United States Department of Agriculture and determines the volume of lemons to be shipped pursuant to the federal marketing agreement, does not consider the availability of processed juice in reaching its determinations. (Tr. 1712–13).

3. *Price Differences*

Substantial price differences may place two products in separate markets, although price alone will not always be a determining factor. Compare *Cellophane, supra*, 351 U.S. at 396, with *Philadelphia World Hockey Club, Inc.*, v. *Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 501–02 (E.D. Pa. 1972). See also *Alcoa-Rome, supra*, 377 U.S. at 276. In the *Hockey Club* case the district court's determination that major league professional hockey was a separate market from minor and amateur league hockey was based in part on a much higher average ticket price for major league hockey than for the other two. See also *International Boxing Club, Inc.* v. *United States*, 358 U.S. 242, 250–51 (1959). The evidence shows that juice squeezed from fresh lemons [11] costs from three to five times more than ReaLemon, and from four to seven times more than other bottled lemon juices, depending upon fluctuations in the price of fresh lemons. The substantial price difference was stressed in ReaLemon advertising (Tr. 4557; RX 546, p. 6; RX 375). Complaint counsel's economic expert testified that a sustained price differential of this magnitude is itself strong evidence that the two products are not close substitutes (Tr. 6130, 6186–87). Cf. *General Foods, supra*, 386 F.2d at 942; *Reynolds Metals Co.* v. *FTC*, 309 F.2d 223, 229 (D.C. Cir. 1962).

4. *Price Sensitivity*

Since market analysis concerns the identification of products that exert competitive pressures on the product in question, products that

respond to each other's price changes are likely to be included in the same relevant market, while products that do not exhibit such responsiveness may be held to be in separate markets. See *Cellophane, supra*, 351 U.S. at 400. The record is replete with evidence that competitive conditions in the fresh lemon market have no impact on the sales or price of processed lemon juice (*e.g.*, Tr. 4557). Buyers for the large grocery chains testified that increases in the price of fresh lemons are not accompanied by an increase in the sales of the bottled variety (Tr. 1521-22; Tr. 2628-29). Moreover, the price of fresh lemons changes on a week-to-week basis (Tr. 4623; CX 371) while the price of ReaLemon exhibits much less volatility (*e.g.*, CX 37-54). Cf. *SmithKline, supra*, 1978-1 Trade Cas. at 74,303; *General Foods, supra*, 386 F.2d at 942.

Respondent's expert witness conducted a study of the "elasticity of substitution,"[11] between processed lemon juice and fresh lemons, the results of which purported to show substantial interchangeability between the two products (RX 330-34; Tr. 5187, 5760-61). We agree with the ALJ [12] that there are substantial defects in the study, particularly in the absence of a reliable figure for "own-price elasticity."[12] See ID pp. 137-42. We do not view respondent's study or the conclusions drawn therefrom as reliable, in the face of the overwhelming evidence in the record demonstrating that processed lemon juice and fresh lemons may be found to be in separate markets.[13]

5. *Other Submarket Criteria*

The marketing of products through distinct channels of distribution has been recognized as a factor indicating that the products are in different competitive markets. See, *e.g.*, *United States* v. *Mrs. Smith's Pie Co., supra*, 440 F. Supp. at 229; *United States* v. *Blue Bell, Inc.*, 395 F. Supp. 538, 546 (M.D. Tenn. 1975). Fresh lemons are marketed through produce brokers, who then sell through produce wholesalers (Tr. 744, 6203), while processed lemon juice is sold through grocery brokers or salesmen (Tr. 130, 149-50, 540). It is

[11] "Elasticity of substitution" is a measure of how the ratio of the demands for two products changes as the ratio of their respective prices changes (Tr. 5149).

[12] "Own-price elasticity" refers to the effect of a product's own price on its demand (Tr. 5160). Obviously, unless one knows how much of a change in demand for a product is caused by changes in its own price, one cannot determine with any assurance how much is attributable to the change in another product's price (*e.g.*, Tr. 6027). Because respondent's expert did not have data for the own-price elasticity of fresh lemons or processed lemon juice, he used sugar, for which such data were available, as a proxy. The testimony of complaint counsel's expert that such a choice was speculative, which we find persuasive, casts doubt on the validity of the conclusions (Tr. 6029-30).

[13] Even if the data accurately represented the elasticity of substitution between the two products it appears that the figure derived is well below the range in which two products would be considered in the same market (Tr. 6033-38; see also Tr. 6124-26).

particularly significant that Sunkist and Ventura Coastal, which sell both fresh lemons and processed juice, have separate marketing groups for distribution of the two products. (Tr. 678; 738-39).

Finally, it is clear that fresh lemons and processed lemon juice are produced in very different facilities, and there is no supply-side interchangeability between the two products (ID 68). [13]

C. Summary

To summarize, our examination of the factors outlined in *Brown Shoe* in light of the record developed in this proceeding supports the conclusion that processed lemon juice constitutes the relevant product market within which to test the allegations of the complaint.

Moreover, on this record, the supply and demand characteristics and relationships of processed lemon juice and fresh lemons are sufficiently distinct that they are not "reasonably interchangeable" within the meaning of *Cellophane*. Cf. *United States* v. *Grinnell Corp., supra*, 384 U.S. at 573-75; *SmithKline, supra*, 1978-1 Trade Cas. ¶62,007 (3d Cir. April 3, 1978), petition for cert. filed, 47 U.S.L.W. 3009 (U.S. June 30, 1978) (No. 77-1869). In particular, the significant and longstanding price difference between the two products, and the lack of any demonstrated price responsiveness between them, persuade us that processed lemon juice is an appropriate "part of commerce" in this case even without resort to the *Brown Shoe* criteria. See Tr. 6130.

II. MONOPOLIZATION

The offense of monopolization has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

A. Monopoly Power

Monopoly power is defined as the power to control prices or exclude competition. *United States* v. *Grinnell Corp., supra*, 384 U.S. at 571; *Cellophane, supra*, 351 U.S. at 391 (1956); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 811 (1946). The existence of monopoly power can ordinarily be inferred from a predominant share of the market. *United States* v. *Grinnell Corp., supra*, at 571. The record demonstrates that Borden possesses monopoly power, as it is commonly understood, in the processed lemon juice market.

ReaLemon has persistently controlled a monopoly share of the processed lemon juice market. Data compiled by complaint counsel show that during 1969-74, Borden's market share ranged from 75.3-88.7% on a gallonage basis and 77.8 - 88.9% on a dollar basis [14] (CX 239; Tr. 2806). Similar estimates are derived from Borden's marketing plants. For example, data collected and published by Selling Areas - Marketing, Inc. ("S.A.M.I.")[14] showed ReaLemon's nationwide market share hovering around the 90% mark during 1970-72 (CX 1, p. 639; CX 2, pp.668, 706; CX 3, pp. 737, 759). In April - May 1974, "S.A.M.I." data showed Borden holding market shares over 70% in 27 of 30 major metropolitan markets, over 80% in 17 such markets, and over 90% in 7 such markets (CX 258). Similarly, for the 52 weeks ending August 31, 1973, Borden's market share exceeded 70% in 23 of the same 30 markets, and exceeded 80% in 12 such markets. (CX 4, p. 883). Local market breakdowns indicate continuous dominance by ReaLemon in most metropolitan areas throughout 1971-74, with market shares generally well in excess of 75% (CX 258).

Without question, these market shares are well within the range of those found to evidence monopoly power in prior cases,[15] and show sufficient dominance on the part of Borden to justify an inference of monopoly power. *United States* v. *Grinnell Corp., supra.*

We need not rely solely on inferences drawn from dominant market share, however, for the record offers ample evidence that Borden possessed and exercised the power to control prices and exclude competition. Although ReaLemon brand reconstituted lemon juice is virtually [15] indistinguishable in its properties from competing brands of processed lemon juice (*e.g.*, CX 1, p. 650; CX 2, p. 673),[16] ReaLemon was consistently able to command a substantial price premium over the price at which other brands sold (*e.g.*, Tr. 973, 1188, 1515-16, 1628, 1850, 1960-61, 1987, 2104-06, 2606-07). As the 1971 ReaLemon Marketing Plan stated:

In a completely unique situation, ReaLemon Lemon Juice presently commands a

[14] Selling Areas - Marketing Inc. is a recognized, well-established market research organization. "S.A.M.I." data are considered reliable and are used by Borden and its competitors in making business decisions (ID 71).

[15] *E.g., United States* v. *Grinnell Corp., supra*, 384 U.S. at 567 (87%); *International Boxing Club, Inc.* v. *United States*, 358 U.S. 242, 249 (1959) (81%); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 796-97 (1946) (68%); *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 F.2d 449 (9th Cir. 1968), *rev'd on other grounds*, 389 U.S. 384 (1967) (67%); *Power Replacements Corp.* v. *Air Preheater Co.*, 356 F. Supp. 872 (E.D. Pa. 1973) (75%). See also *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488, 496 n.18 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

[16] It appears that Golden Crown, a competing brand, may have sold an adulterated product (ID pp. 131-32), and it is thus possible that consumers may have preferred the taste of ReaLemon to Golden Crown (see CX 3, p. 756, but see, *e.g.*, Tr. 1514). However, the record does not indicate any objective differences in quality between ReaLemon and any of the other brands of processed lemon juice, and ReaLemon's Marketing Plans acknowledged the fungible nature of the product (ID 83).

premium of as high as 25 to 30 cents per unit over competitive offerings. No such differential on any other foods product, frozen or non-frozen, exists anywhere in the industry.

CX 1, p. 665. The premium sometimes exceeded 30%. (CX 3, p. 740; CX 4, p. 855). This price differential, achieved through the successful differentiation of the ReaLemon brand, served as the instrument by which Borden could control prices and entry in the processed lemon juice market.

The ReaLemon brand provides almost a case study of product differentiation. In the 1972 Marketing Plan, ReaLemon's president described the brand as "one of the greatest brand names in the history of the supermarket" (CX 2, p. 670). Witnesses consistently referred to the ReaLemon name as "almost generic" (Tr. 1284), or "almost a generic term" (Tr. 1022); as one grocery buyer put it, "Lemon juice was almost synonymous, as far as a grocery product was concerned, with ReaLemon" (Tr. 1514; see also Tr. 3436 ("synonymous with the name")). Another grocery buyer summarized ReaLemon's success in differentiating its brand name from other competing brands:

> Personally I think that the ReaLemon people, being in the Wisconsin market, for the length of time that they have built a brand image that they have, that when a consumer walks into a retail store to pick up a bottle of concentrated [16] lemon juice, she's got in her mind that it is ReaLemon, regardless of whose it is; and we found this true in many other categories that we carry.
>
> The first in, that constantly promotes their own brand themselves, seems to almost create a brand identity in the consumer's mind that she just can't get out of it.

Tr. 1960-61. See generally ID 83-85. That this was Borden's intention is clear from the objective stated in the 1971 Marketing Plan.

> Although reconstituted lemon juice is virtually indistinguishable one brand from another, heavy emphasis on the ReaLemon Brand name through its media effort should create such memorability for the brand, that an almost imaginary superiority would exist in the mind of the consumer, a justification for paying the higher price we are asking.

CX 1, p. 650.

Dr. Michael Mann, complaint counsel's economic expert, testified that a new entrant into a market dominated by a firm with a successfully differentiated product such as ReaLemon might try to detach customers from the dominant brand by charging a lower price. The firm in the dominant position could then reduce its price, to narrow or even eliminate the price differential, and thereby prevent the new entrant from becoming a significant competitor.

The new entrant would then be forced to respond by further lowering its price so as to restore the original price differential which is considered necessary to detach customers. Dr. Mann testified that this could set in motion a "ratchet effect" that could ultimately drive the entrant out of the market, since the price charged by the new entrant would likely be the first to fall below average variable cost. (Tr. 956-57; ID 96-97).

It is precisely this situation that existed in the processed lemon juice market. ReaLemon's competitors perceived the need to price their products at a level below ReaLemon in order to capture sales and supermarket shelf space (Tr. 158-59, 650-52, 687). ReaLemon likewise recognized its ability to preserve its dominant market share by maintaining the existing price differential vis-a-vis competing brands (ID 99). [17]

The Commission discussed the effect of product differentiation as an entry barrier in *Procter & Gamble Co.*, 63 F.T.C. 1465 (1963), *vacated & remanded* 358 F.2d 74 (6th Cir. 1966), *rev'd*, 386 U.S. 568 (1967):

> [I]n an industry in which product differentiation is an important factor, not only may the new entrant find it especially difficult to pry customers loose from the established firms, but the higher price obtainable for a brand that has been successfully differentiated in the public mind from competing brands may impart a flexibility in pricing, akin to that imparted by cost advantages, which the newcomer may not be able to achieve for many years.

63 F.T.C. at 1553. The successful differentiation of the ReaLemon brand thus served not only as a restraint on competitors' prices, but as a barrier to entry.

There was abundant industry testimony to the effect that supermarket shelf space is limited, and that if a supermarket had room on its shelves for only one brand of lemon juice, that brand would be ReaLemon (ID 86). The record also establishes that Borden enjoyed tremendous advantages over its competitors in terms of advertising and promotion (ID 91-94). For example, between 1969 and 1973 ReaLemon spent $3.8 million on advertising (CX 288), while competitors' expenditures were negligible (CX 2, p. 681; CX 3, p. 772). ReaLemon's total expenditures on advertising and promotion during the same period were $13.8 million (CX 288).

Finally, although there is sharp dispute between the parties as to whether ReaLemon earned an above average rate of return on assets, the weight of evidence supports the ALJ's finding that ReaLemon persistently earned a rate of return far above the norm,

both for manufacturing corporations generally and for food [18] manufacturing corporations. (ID 89-90; Tr. 6118, 6121).[17] This persistent high profitability is further evidence of Borden's monopoly power (Tr. 6131, 6152). See *United States* v. *General Electric. Co.*, 82 F. Supp. 753, 894-95 (D.N.J. 1949).

Thus, with a dominant share of the market, a dominant tradename which was virtually synonomous with processed lemon juice, a persistent ability to command supermarket shelf space and premium prices despite an essentially fungible product, and high profitability, Borden clearly possessed monopoly power in the processed lemon juice market.

B. Maintenance of Monopoly Power

Under the *Grinnell* test, *supra*, it is not sufficient to show the mere possession of monopoly power; it must also be shown that that power was [19] willfully acquired or maintained. Since ReaLemon was the first firm to develop and market a bottled lemon juice, it naturally had a monopoly in that market at the outset.[18] The record makes clear, however, that it later took steps to ensure that that monopoly position would not be lost or eroded, and engaged in acts and practices designed to frustrate competition.

1. *General Principles*

It is important to recognize that acts and practices need not in themselves be independently unlawful or predatory to constitute acts and practices of monopolization. See *e.g.*, *United States* v. *Griffith*, 334 U.S. 100, 105 (1948); *American Tobacco Co.* v. *United States* 328 U.S. 781, 809, 814 (1946); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 431-32 (2d Cir. 1945) *("Alcoa"); United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 344-45 (D. Mass.

[17] The parties disagree as to whether, in computing ReaLemon's rate of return on assets, one should disregard the sum of $9,602,895, which represents the difference between the price Borden paid for the ReaLemon-Puritan Company and that company's adjusted net worth at that time. Complaint counsel's witness computed rates of return excluding that figure, and arrived at rates ranging from 16.9 to 35.2% during 1968-73 (CX 294). This compares, for the same period, with a range of 5.0 to 6.9% for all manufacturing corporations, and 5.5 to 8.1% for the food and kindred products industries (CX 300-01). Respondent argues that the $9.6 million figure is appropriately treated as good will, and hence part of the asset base for computation of rate of return. By respondent's calculation, ReaLemon's rate of return ranged from 8.1 to 10.2% during 1968-1973 (RX 393).

If ReaLemon had never been acquired by Borden, a value would never have been placed on ReaLemon's "good will" (Tr. 4914), and, consequently, ReaLemon's profitability as an independent entity would be calculated without reference to any such figure. Since the $9.6 million in Dr. Mann's words, "discounted a rather handsome stream of future earnings" (Tr. 6118), we agree with the ALJ that there is good reason to exclude it from the total assets upon which the rate of return is computed. We also note that even if respondent's calculations are used, ReaLemon earned a rate of return during the period 1963-1973 which was roughly one and one-half times that of all food and kindred products firms, a difference which some economists, including Dr. Mann, regard as indicative of market power (Tr. 6117-18).

[18] Borden acquired the ReaLemon-Puritan Co., the original maker of ReaLemon, in 1962 (ID 2).

1953), *aff'd per curiam*, 347 U.S. 521 (1954). When a firm possessing monopoly power uses that power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor," *United States* v. *Griffith*, *supra*, 334 U.S. at 107, it is guilty of monopolization. Moreover, the cases establish that a firm that has monopoly control of a market may not engage in practices that are designed to continue such control. *Greyhound Computer Corp.* v. *International Business Machines Corp.*, *supra*, 559 F.2d at 503; *Alcoa*, *supra*, 148 F.2d at 432; *United Shoe Machinery Corp.*, *supra*, 110 F. Supp. at 345. Here, as set forth above, Borden possessed monopoly power in the relevant market, which was rooted largely in its successful and spurious product differentiation that enabled it to command a substantial price premium over essentially identical offerings of other sellers, as well as to have a virtually unshakable spot on the grocer's shelf. Borden's manipulation of this price differential was a key element in its ability to resist competitive inroads and maintain its monopoly share of the market.

Alcoa contains perhaps the most eloquent statement of the law of monopolization. There, Alcoa had for years maintained a 90% share of the relevant market. It had achieved its dominance through a combination of patents [20] and various unlawful practices; the former expired in due course, and the way in which Alcoa thereafter maintained its monopoly share of the market for 28 years was the issue in the case before the Court of Appeals.[19]

The principal "conduct" attributed to Alcoa in support of the assertion that it had "monopolized" the market for aluminum ingot[20] was its practice of expanding existing plants and constructing new facilities in anticipation of increased demand for the product. This expansion of capacity had the effect of discouraging and frustrating entry into the field by other firms. Judge Learned Hand, writing for the court, delineated the proper means of analyzing the conduct of a firm with monopoly power:

> We need charge it with no moral derelictions after 1912, we may assume that all it claims for itself is true. *The only question is whether it falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market.* It seems to us that that question scarcely survives its statement.

148 F.2d at 431 (emphasis added). Reviewing Alcoa's expansion policy, the court stated that it could "think of no more effective

[19] Because there was not a quorum of the Supreme Court to hear the Government's appeal, the case was referred to the Second Circuit sitting as a final appellate court pursuant to a statute now codified at 28 U.S.C. 2109.

[20] Other practices of Alcoa were alleged to be unlawful, but these were considered wholly apart from the question whether Alcoa had unlawfully "monopolized" the ingot market. 148 F.2d at 432.

exclusion than to embrace each new opportunity as it opened," and concluded:

> Only in case we interpret "exclusion" as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not "exclusionary." So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent.

Id.

[21] While *Alcoa* was an opinion only of one court of appeals[21], its authority is well-recognized, and one year later, in *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946), the Supreme Court "welcome[d] this opportunity to endorse" the conclusions of the *Alcoa* court, including the last-quoted passage. *Id.* at 813-14. See also *Hanover Shoe, Inc.* v. *United Shoe Machinery, Inc.*, 392 U.S. 481, 496-502 (1966).

One point made clear by the *Alcoa* case is that the conduct of firms with monopoly power is viewed differently from that of firms without such power.[22] Taken together, *Alcoa*, *American Tobacco* and *United States* v. *Griffith*, *supra*, lead to the conclusion that firms with monopoly power may not maintain that power through means which are not economically inevitable. Cf. *United States* v. *United Shoe Machinery Corp.*, *supra*, 110 F. Supp. at 343.

This conclusion follows naturally from the strong policy of the antitrust laws, to which monopoly is repugnant.[23] These policies have been described many times in many places, not least in the decisions of this Commission. For present purposes, we feel that the *Alcoa* opinion nicely summarizes some of these policies:

> Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.
>
> . . . . . .
>
> [22] Throughout the history of [the antitrust laws] it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.

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[21] But see note 19 *supra*.

[22] As the Ninth Circuit stated in *Greyhound Computer Corp.*, *supra*: "If the jury concluded that IBM possessed monopoly power in the leasing of general purpose computers, IBM would be precluded from employing otherwise lawful practices that unnecessarily excluded competition from the submarket." 559 F.2d at 498, citing *United Shoe Machinery Corp.*, *supra*. Cf. *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155 (1951).

[23] See generally Turner, *The Scope of Antitrust and Other Regulatory Policies*, 82 Harv. L. Rev. 1207, 1217-24 (1969), arguing that Section 2 of the Sherman Act can be applied to monopoly power that has been persistently maintained over a substantial period of time, except where based solely on economies of scale or unexpired patents.

Id. at 427, 429. Some monopolies are inevitable, some are natural, and others are "thrust upon" their owners. But where a firm with monopoly power interfers with natural economic forces which would otherwise dissipate its monopoly, the law rightfully condemns it.

In light of these overriding policies we must determine whether Borden's maintainance of monopoly control over the processed lemon juice market was economically inevitable, or whether, like Alcoa, it "meant to keep, and did keep" that control over the market with which it started. *Id.* at 432.

2. *Borden's Unlawful Maintenance of Monopoly Power*

That Borden, in the words of the *Alcoa* court, "meant to keep" its monopoly share is evident from its marketing plans. For example, its 1971 Marketing Plan described the company's long range objective as expanding the total market for processed lemon juice, inasmuch as ReaLemon had "become a protective umbrella over all lemon juice activity," and increase in overall demand would redound to ReaLemon's benefit (CX 1, p. 649). The Plan went on to describe Borden's "Short Range Objectives" as follows:

> 1. The spread between ReaLemon prices and those of competitors preclude any possibility of price increases to offset higher costs. By not permitting this spread to increase, at the expense of short term profits, ReaLemon anticipates maintaining its market share close to its present level. Market share is the key, since industry or total market growth will be reflected more toward ReaLemon than its competitors by virtue of ReaLemon's present 90% market share. [23]
>
> 2. Although reconstituted lemon juice is virtually indistinguishable one brand from another, heavy emphasis on the ReaLemon Brand name through its media effort should create such memorability for the brand, that an almost imaginary superiority would exist in the mind of the consumer, a justification for paying the higher price we are asking.

CX 1, pp. 649-50. This document evidences Borden's intent to hold on to its monopoly share of the market by sacrificing somewhat higher prices over the short-run to assure continued monopoly returns over the long haul. Borden's ability to achieve this objective, the record demonstrates, rested on the price premium it enjoyed and its ability to manipulate that price differential to the detriment of competitors.

The 1971 Marketing Plan further described one technique by which Borden sought to carry out its goal of maintaining a monopoly. This involved the use of geographically discriminatory promotional allowances. In prior years allowances had ranged from 60 to 90 cents per case, or 5 to 5 1/2 cents per bottle. The Plan described a proposed change in promotional policy:

Based on the success of these promotions in the past, ReaLemon will repeat them in 1971, with variations. *In those markets where competition has been making inroads, tentative plans are to increase the size of the allowances to as much as $1.20 per case, or 10¢ per bottle* . . . We will again be specifically attacking the problem of the retail price spread between ReaLemon and competition. *In general terms, competitive activity exists in the Eastern half of the United States and for the Western Half, promotional allowances will be limited to a range of 60 to 75 cents per case.*

CX 1, pp. 656-57 (emphasis added). In other words, the price would be reduced selectively in those areas where some competition had arisen, but would be kept high in other areas.

Similarly, the 1973 Marketing Plan summarized the strategy for that year in terms of two objectives. "Reversal of competitive inroads in ReaLemon market share," and "Increased category growth" (CX 3, p. 741). ReaLemon's national market share at that time was 88% (CX 3, p. 759). "Strengthening of the consumer franchise to justify the price differential versus Golden Crown" was seen as a major opportunity (CX 3, p. 758). [24]

The key strategy for ReaLemon in the 1973 Plan was to continue the geographically selective promotional policy, discriminating between "highly competitive" and "moderately or low competitive" localities, with the objective of boosting market share from 86.5 to 89.0% (CX 3, pp. 784, 786, 787).

For 1974, the Marketing Plant targeted four "key districts" - New York, Philadelphia, Chicago and Detroit - for major efforts to increase ReaLemon's market share, as part of an overall plan "to reduce Golden Crown share by 20%" (CX 4, p. 864). Since these target districts were areas in which Golden Crown had made considerable gains, and in which per capita consumption of lemon juice was high, it was felt that "[d]ecreasing Golden Crown effectiveness in these markets may result in a significant reduction of expansion leverage" (*Id.*).

Once again, geographic price discrimination was the strategy chosen by ReaLemon to achieve its objective of reversing the Golden Crown inroads. ReaLemon's plans for its spring promotion were to continue the winter 1973 level of $2.25 per case in the four key areas mentioned above, while reducing allowances elsewhere by some 30% (CX 4, p. 872). The budget for promotional expenses continued the steady increases exhibited since 1967 (ID 125). See also CX 4, pp. 884, 892-94, which graphically depicts the way promotional allowances and co-op advertising allowances were manipulated on a geographic basis. Similarly, planned price increases for quart bottles of ReaLemon, occasioned by cost increases, were not to go into effect in "highly competitive Golden Crown markets," while the list price was to be increased by 15 cents per case elsewhere (CX 4, p. 873).

The record indicates that Borden carried out the anticompetitive pricing practices set out in the ReaLemon marketing plans.[24] In particular, geographic price discrimination was a key element in Borden's strategy to maintain its monopoly share of the processed lemon juice market. [25] In 1969 Borden departed from its uniform nationwide pricing system and divided the nation into two zones for pricing purposes, and in 1970 switched to a three zone system (ID 132).[25] Since then Borden has maintained a lower price in Zone 2, which comprises the Northeastern United States, than in the other two zones (ID 131); coincidentally, Zone 2 is where Borden has faced the most serious competitive inroads, notably those of Golden Crown. The lower prices in Zone 2 are not attributable to lower costs; in fact, the evidence shows that Borden's costs of production were higher at its Eastern plant than at its Chicago plant (ID 131).[26] With respect to list prices, the record shows that Borden was able to command a price considerably in excess of that of competing brands, and that it reduced that price selectively in areas where it wished to suppress emerging competition.

More important in Borden's scheme of discriminatory area pricing were discriminatory promotional allowances. Such allowances, whether deducted directly from the invoice or "billed back," *i.e.*, subsequently remitted, amount to price reductions (to the retailer) designed to induce the retailer to promote the manufacturer's product or to offer it for sale at a reduced price (ID 134).

While price promotions represent "temporary" reductions from list price, their importance in the overall marketing scheme should not be underestimated. In 1972, fully 71.1 percent of ReaLemon's sales in the 32-ounce size bottle were "on deal," that is, made during a price promotion (CX 4, p. 872). ReaLemon's 1974 Marketing Plan estimated that in 1973 that percentage rose to 84.1% *(Id.)*. Clearly the price during promotional periods has more practical significance than list price in examining Borden's pricing policies. Until 1971, Realemon's policy with respect to price promotions was to offer such allowances on a uniform nationwide basis (ID 135). In 1971, Realemon adopted the policy of tailoring the amounts of promotional allowances to the competitive situation in individual areas. In [26] that year it increased the allowance in 15 of its highest volume Eastern markets where it faced new competition, to reduce the price

[24] See generally ID 128–30, which recounts intra-corporate correspondence concerning Borden's efforts to implement the strategies and objectives of the marketing plans.

[25] Zone 1 consists of the Midwestern states, Zone 2 the Northeast, and Zone 3 the South and West. Borden produces ReaLemon at plants in Chicago, upstate New York, and California.

[26] Similarly, lower distribution costs do not explain the difference, since f.o.b. plant prices were also lower in Zone 2 (ID 131).

differential between ReaLemon and competing brands, and thereby preserve its market share (Tr. 4468-69).[27]

In the summer of 1973, for example, Borden was offering promotional allowances of only 90 cents per case in areas where there was little significant competition (CX 180). Yet, allowances amounted to $1.50 in more competitive cities in the Northeast and North Central regions, and were increased to $1.80 in Philadelphia and to $2.00 in Atlanta, Dallas, and Florida (*Id.;* RX 561; Tr. 4731-32). See also ID 141-44. These allowances translated into reductions of 10 cents or more per quart bottle at the retail level (*e.g.*, CX 2, p. 677).

A summary of the evidence relating to geographic price discrimination reveals that ReaLemon historically sold at a premium price relative to competing brands while maintaining a dominant share of the market, both nationally and in numerous metropolitan areas. The emergence of a new competitor, Golden Crown, which marketed, priced, and promoted its product aggressively in certain local markets, caused Borden to seek ways to hold on to its dominant share of the market.[28] It did so by selective price cuts (either through reductions in list price or through promotional allowances) that were aimed at reducing the price spread between Borden and its competitors, including Golden Crown, with the intent of forestalling competitive inroads. Borden's price cuts and promotional allowances were considerably higher in areas where competition was perceived as strong than in areas where it faced only weak competition, and were undertaken with the specific intent of recapturing market share from Golden Crown. [27] Borden recognized that reducing the price of ReaLemon left competitors with the choice of correspondingly reducing their own prices to maintain the traditional differential, hence threatening their own profitability, or losing market share.

There is also evidence in the record showing that Borden sold to competing customers in the same local market at different prices, without cost justification. In Philadelphia and Buffalo it appears that favored retailers who were the leading chains in their respective areas received the benefit of discriminatorily lower prices (through additional promotional and cooperative advertising allow-

[27] These levels were reduced in the summer of 1972, and then increased once again in the winter of that year (Tr. 4470-71).

[28] Borden contends that Golden Crown was pricing below its costs in attempting to capture market share from ReaLemon. We agree with the ALJ that whatever the truth of this contention, it is no defense to the monopolistic practices of Borden (ID 208 and pp. 160-61). Clearly, only by offering an especially attractive price (even if it fell below its own costs) could Golden Crown hope to obtain a secure foothold in supermarkets and sustain a challenge to ReaLemon. Cf. III Areeda & Turner, *Antitrust Law*, ¶716, contending that temporary promotional pricing, even when below cost, by new entrants or small firms without monopoly power, should be permitted, and should be prohibited only when engaged in by a monopolist.

ances) (ID 147-65). These discriminations had the short-term effect of preventing these customers from buying from Borden's competitors (ID 152, 164) and are indicative of Borden's overall strategy of using the pricing mechanism selectively, including discriminations arguably within the reach of the Robinson-Patman Act, to restrain competition.

The complaint also charged Borden with selling ReaLemon juice below cost or at unreasonably low prices with the effect of injuring, suppressing or destroying competition. One view of predatory pricing holds that pricing by a monopolist below marginal cost is predatory,[29] and that average variable cost, which can be ascertained with some precision, is a valid proxy for marginal cost, which is considerably more difficult to determine.[30] The [28] parties introduced considerable evidence on the issue of whether Borden sold ReaLemon in 32-ounce bottles to Acme Markets in Philadelphia and Niagara Frontier Services in Buffalo at prices below its average variable cost.

Complaint counsel and respondent offered differing computations of Borden's average variable cost of producing cases of ReaLemon quarts for distribution in Buffalo and Philadelphia during 1971, 1972 and 1973 (Compare CX 293 with RX 654). The ALJ accepted Borden's calculations, and concluded that ReaLemon juice was not sold below cost (ID 187, 192).

Borden's and complaint counsel's computations differed in the treatment of advertising expense, average selling expense, and distribution costs. We agree with Judge Hanscom that respondent's treatment of average selling expense is preferred (ID 180-81),[31] and we are not persuaded on this record that advertising costs should be included in the computation of average variable cost (ID 179).[32] On

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[29] See, *e.g.*, *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 857-58 (9th Cir. 1977), petition for cert. filed, 46 U.S.L.W. 3755 (U.S. May 30, 1978) (No. 77-1706). See also R. Posner, *Antitrust Law: An Economic Perspective* 188 (1976); Areeda & Turner, *supra* note 28, ¶715; but see Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869 (1976); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284 (1977). We do not find it necessary to decide whether this is the exclusive, or even the preferred, test for predatory pricing. Commissioner Pitofsky's concurring opinion points out some of the shortcomings of a strict marginal cost pricing rule in the situation where a monopolist enjoys a substantial price premium derived from successful product differentiation. However, the ALJ and the parties both utilized this approach, and we find it a useful one for illuminating the issue.

[30] Areeda & Turner, *supra*, ¶715d. Marginal cost is simply the added cost of making and selling the last unit. *Id.* Variable costs are costs which vary as output varies, as distinguished from fixed costs, which remain constant at differing levels of output. *E.g.*, Tr. 2791.

[31] In computing average variable cost, Borden included only that portion of average selling expense attributable to commissions paid to brokers and salesmen, while complaint counsel included the entire average selling expense figures (ID 180). The latter figure includes sales managers' salaries and administrative costs, such as sales offices, items which complaint counsel's expert conceded are fixed costs (Tr. 4701-02). We accept Judge Hanscum's adoption of respondent's treatment of this element of cost.

[32] But see III Areeda & Turner, *supra*, ¶715c at 173-74, contending that advertising and promotional expenditures should be included in the computation of variable costs. This is the conclusion adopted by Commissioner Clanton in his concurrence. However, the record reflects that ReaLemon's advertising expenditures

(Continued)

the issue of average distribution costs [29] we are inclined to view complaint counsel's approach as more reliable.[33]

While it does not appear that ReaLemon was sold below average variable cost, at least not as a consistent course of conduct, it does appear that Borden sold below average *total* cost, when fixed costs are added in. Professor Posner has offered an alternative definition of predatory pricing to the short-run marginal cost rule proposed by Areeda and Turner. [30] R. Posner, *Antitrust Law: An Economic Perspective* 188-93. Posner would condemn pricing at a level calculated to exclude from the market an equally or more efficient competitor. *Id.* at 188. Two practices fit his definition: selling below short-run marginal cost; and selling below long-run marginal cost with the intent to exclude a competitor. He would use average *total* ("balance sheet") cost as a surrogate for long-run marginal cost. *Id.* at 190.[34]

The record does not indicate that Borden was more efficient than Golden Crown (the only competitor for which cost estimates are available in the record). The lowest figure in the record for the variable cost of producing cases of ReaLemon quarts during 1971-73 was $3.58, respondent's estimate for the costs of ReaLemon shipped to Acme Markets in Philadelphia on a "direct shipment" basis in 1971 (RX 654). Respondent's high estimate was $4.02 *(Id.)*. Complaint counsel's calculations for the same period ranged from $3.84 to $4.39 (CX 293). ReaLemon estimated Golden Crown's cost of ingredients (including an adjustment for suspected adulteration), distribution, selling, and overhead at $3.74 per case (CX 3, p. 762). Golden Crown's president estimated his firm's costs at $3.11 before freight and selling expenses, and approximately $4.00 including those items (CX 145; Tr.

did not vary, at least in the short run, with the level of output. For example: Borden spent more on advertising in 1969 than in any of the subsequent four years, although sales increased almost steadily throughout that period (CX 298, 292). This is not surprising, inasmuch as advertising represents, at least in part, an investment in future consumer preference. Thus, advertising seems more like a long-run than a short-run marginal cost, and we will accept Judge Hanscom's exclusion of advertising from the computation of average variable cost.

[33] Complaint counsel computed the distribution component of their average variable cost figure by using average nationwide figures for ReaLemon, which is the manner used by Borden in its own internal computations (ID 182, 184; Tr. 3660-61). These records are used, *inter alia*, for the purpose of keeping ReaLemon senior management advised of current operating costs (Tr. 4445). Borden, on the other hand, for the purpose of introducing evidence in this proceeding, attempted to calculate the actual cost of distributing ReaLemon juice to the customers in Philadelphia and Buffalo, Acme and Niagara, which were the alleged beneficiaries of below cost sales (ID 183). Ideally, as complaint counsel's expert testified, it would be preferable to have precise actual data in determining average cost for particular customers (ID 184; Tr. 4709-10). However, at least with respect to some sales to Acme in Philadelphia, respondent appears to have understated actual distribution costs by making some unwarranted assumptions as to the manner of shipment (ID 185).

The fact that Borden, in the course of its business, uses national average figures for distribution costs seems highly persuasive. The object of the exercise is to determine whether Borden was selling at prices which *it knew* (or should have known) to be unprofitable in the short run. The fact that more precise analysis might have shown that Borden's cost of making a particular sale was less than it had been assumed to be seems irrelevant to a determination of predation.

[34] Commissioner Pitofsky adopts this approach as part of the predatory pricing information put forth in his concurring opinion.

137-43). Thus, it appears that neither firm was appreciably more efficient than the other.

These facts form the basis of Judge Hanscom's findings that ReaLemon was sold to Acme and Niagara at "an extraordinarily low price" and that "Borden either failed to consider its cost before agreeing to the low sale prices, or knew that it was selling very close to the cost figures reflected in the data that were then available to it" (ID 193). The effect of these sales is detailed in the record. In 1973, Borden was selling at 10 to 21 cents per bottle more than Golden Crown in the quart size in Eastern and North Central area markets, according to A.C. Nielsen data. The differential was larger at times, and it was clearly necessary for competitors to price substantially below Borden in order to survive in the market.

Thus, if Acme, aided by heavy promotional allowances from Borden, featured ReaLemon at 39 cents per quart, as it did in the fall of 1973, it would be necessary for Golden Crown, in order to maintain the 10-cent differential, [31] to sell to the retailer at *$2.90* per case,[35] an amount far below anybody's reckoning of its average variable cost (ID 196-99). Likewise, Niagara purchased ReaLemon in 1971 and 1972 at a continuous price of $4.40 per case, permitting a retail price of 37-39 cents per quart; even a five cent price differential would require Golden Crown to sell to Niagara at $3.40 per case (ID 199). Even efficiency comparable to Borden in producing lemon juice would not be sufficient to protect competitors from Borden's pricing practices which were made effective by the image-inducted price premium.

The price paid by Golden Crown, the only competitor which made an aggressive attempt to cut into the ReaLemon market share nationally, demonstrates the extent and effects of Borden's power. In the 12 months ending October 31, 1973, for example, Golden Crown posted a net *loss* of roughly $500,000 (CX 147; Tr. 2384-85).[36] ReaLemon Foods' net *income* in 1973, by way of contrast, was $2,087,000, and its annual net income was never less than $1.6 million in any year between 1968 and 1974 (CX 289). When Golden Crown was sold to a Seven-Up subsidiary in 1974, the cash price was $1,239,676, less $934,085 in liabilities assumed by the buyer, or a net cash payment of only $305,591 (RX 665). The contract of sale, as is typical in speculative transactions of this nature, also provided for a five-year earn-out which could add as much as $1,750,000 to the purchase price *(Id.)*. These figures illustrate the financial weakness

[35] Taking into account a retailer mark-up of 29 percent, a figure at the low end of the estimates in the record (ID 196).

[36] In the previous 12 months the company had made a small profit ($17,584), and had recorded a small loss ($6,253) the year before that (CX 147).

of Borden's "strongest" competitor, and the heavy toll Borden was able to inflict on those who challenged its dominance of the processed lemon juice market.

3. *Conclusions of Law*

It can hardly be said that the maintenance of Borden's monopoly power was "economically inevitable." That power itself stemmed from the creation of "an almost imaginary [32] superiority" in the consumer's mind (CX 1, p. 650), which enabled Borden to sell a product which was identical to its competition at a price which exceeded the competition's by as much as 30 percent or more. Its maintenance was the result of a calculated strategy employing geographic price discrimination (with price cuts subsidized in part by continued monopoly pricing elsewhere), and favoring key retailers with discriminatorily low prices and prices that, in the market conditions that existed, would have the likely effect of forcing competitors to sell at a loss.[37] This pattern has its parallels in the decided cases under Section 2 of the Sherman Act. See, *e.g.*, *United States* v. *Grinnell Corp.*, 236 F. Supp. 244, 257 (D.R.I. 1964), *aff'd.* 384 U.S. 563 (1966); *United States* v. *United Shoe Machinery Corp.*, *supra.* 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam.* 347 U.S. 521 (1954).

Respondent, in its defense, places principal reliance upon the decision in *Telex Corp.* v. *International Business Machines Corp.*, 510 F.2d 894 (10th Cir. 1975), *rev'g* 367 F. Supp. 258 (N.D. Okla. 1973), *cert. dismissed.* 423 U.S. 802 (1975), and that case merits discussion. There, the Tenth Circuit reversed the district court's ruling that IBM had unlawfully maintained monopoly power in the market for peripheral devices plug compatible with IBM processing units, and various submarkets thereof.[38] The principal means by which IBM was found by the district court to have maintained its monopoly position were the introduction of new peripheral devices at prices substantially lower than the products they replaced, the announcement and implementation of new leasing plans, and IBM's pricing policies with regard to its memory products. [33]

The district court had found that IBM had attained a monopoly position through research and technical innovation, but faced erosion of that position by lower-priced competitors. Accordingly, it developed new products selling at a lower price than the competi-

[37] See *Power Replacements Corp.* v. *Air Preheater Co.*, 356 F. Supp. 872, 897, 898 (E.D. Pa. 1973), *cf. SmithKline Corp.* v. *Eli Lilly & Co.*, *supra*, 427 F. Supp. at 1128.

[38] The court of appeals also reversed the district court's conclusions on the relevant market, but assumed the existence of monopoly power for the purpose of assessing the legality of IBM's conduct.

tion, but still capable of earning a reasonable profit. These acts stimulated concomitant price reductions by IBM's competitors. IBM's new leasing policies also had the effect of a price reduction. Similarly, IBM reduced its prices for memory products to a level below that which it calculated a new entrant would need to charge in order to enter the market. At the same time, it increased prices on other products (central processing units). The district court found that all these acts, although independently lawful, were unlawful when engaged in by a monopolist with the intent and for the purpose of maintaining its monopoly power. It stated:

> It is sufficient that monopoly power is willfully acquired or maintained as distinct from the growth or development in a consequence of a superior product, business acumen or historic accident.

367 F. Supp. at 341. The Tenth Circuit regarded the district court's interpretation of the law as "extremely narrow," and mentioned two additional factors which must be considered:

> [W]hether or not the acts are ordinary business practices typical of those used in a competitive market, and secondly whether the acts constitute the *use* of monopoly power.

510 F.2d at 925–26 (emphasis in original). The court of appeals further noted:

> The trial court did not find nor did it hold that the acts of IBM found to be illegal were derived from its power in the market or its size, nor were they acts which could only have been performed by one with the requisite power. The "acts" found by the trial court to be illegal were ordinary marketing methods available to all in the market.

[34] *Id.* at 926. This, in our view, spells out the principal difference between *Telex* and the instant case. For here, the acts of Borden which we hold to be illegal were derived from and, indeed, made possible by, its power in the market. Moreover, the record indicates that in this market these "acts" could only have been performed by one with Borden's market power, and thus were not "ordinary marketing methods available to all in the market."

In the *Telex* case it appears that IBM attained a dominant position through superior technical attainments, and when competition arose it lowered prices, within a reasonable range, to combat its competition. There is no indication that its strategy of price reductions guaranteed success. Rather, in a market of sophisticated buyers and sellers IBM would be forced, in order to hold onto its market share, to engage in ordinary price and quality competition, and rely upon its ability to produce a product which was satisfactory to buyers and

upon its reputation for quality and reliability. Furthermore, there was no evidence of price discrimination by IBM.

Borden, on the other hand, had the enormous market advantage conferred by the ReaLemon trademark and its magnetic pull on the consumer. In order to preserve its market dominance it manipulated the price premium which that trademark afforded, and engaged in price discrimination. ReaLemon's juice was indistinguishable in its characteristics from competing processed lemon juices; only the market power inherent in the ReaLemon trademark enabled Borden to manipulate price differentials and discriminate among customers in different areas to maximize its advantage over other producers. Neither Golden Crown, nor Seneca, nor Vita-Pakt, nor even such well-known brands as Sunkist or Minute Maid were able to engage in the kinds of pricing practices engaged in by Borden. Clearly these methods were not available to all in the market, and clearly they were directly attributable to Borden's market power. Thus, we conclude that the *Telex* case is distinguishable from the present case, and offers no support for Borden's position. [35]

Professor Scherer has written:

> An image advantage, permitting the maintenance of a price premium, is conceptually analogous to a unit cost advantage. Either enhances the dominant firm's incentive to cut prices temporarily to exclude less-favored rivals. What society obtains following successful image-induced exclusionary pricing is not the freeing of resources that can be employed more effectively elsewhere, but rather, higher prices and profits accompanied by increased consumption of the "premium" product . . . I find it hard to avoid a value judgment that temporary price cutting to eliminate producers handicapped only by an inferior brand image is socially undesirable.

Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869, 889 (1976). Dr. Scherer's analysis applies to this case.

Whether or not Borden sold below short-run marginal cost, it is incontrovertible that its pricing practices, including geographic discrimination which was not cost-justified and pricing very close to average variable cost, were exclusionary in intent and effect.[36] To

[36] We agree with Commissioner Pitofsky that a strategic pricing rule should not require price reductions to be made uniformly across geographic markets without regard to the monopolist's different costs in different markets and the competitive effects of its strategic pricing policies. Moreover, price discrimination among different geographic markets does not of itself constitute a violation of Section 2 of the Sherman Act or Section 5 of the FTC Act. We have found that Borden engaged in geographic price discrimination which injured competition and which was not attributable to lower costs in any market. Our order likewise only prohibits price discrimination which is not cost justified and the "effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors. . . ."

We do not agree with Commissioner Clanton's position that Borden can be condemned as a monopolist for selling below average variable cost (which cost is construed to include advertising) to two customers in two cities but not for manipulating prices in a discriminatory and exclusionary fashion nationwide. Borden's strategy was aimed at more than merely cementing its monopoly in Buffalo and Philadelphia.

the extent that Borden priced below average total cost with the evident intent to exclude Golden Crown, its practices run afoul of Posner's rule. See pages 30-31 *supra*. In any event, the effect of Borden's spurious product differentiation, making it necessary for competitors to sell considerably below ReaLemon, created a [36] circumstance where even prices above marginal cost could, as the record indicates (ID 194-200), be predatory in the sense that even equally efficient competitors could be driven from the market.[39] See R. Posner, *supra*, at 188.

We find that Borden's marketplace advantage is not attributable to a superior product. Nor has Borden been shown to be more efficient than its competitors; if it is, that fact is not reflected in its prices. Nor has Borden contributed anything in the way of innovation since Irvin Swartzberg first developed ReaLemon. ReaLemon is the same product, and is made the same way it has been for many years. ReaLemon is distinguished from its competitors only by the strength of its trademark.

Borden sought aggressively to preserve its monopoly share of the processed lemon juice market, and even to increase it (*e.g.*, CX 3, pp. 790-91; CX 4, pp. 861, 864). It tolerated only fringe competition, and manipulated its price premium to prevent its competitors from growing into serious threats to its monopoly position.[40] We hold that Borden's continued domination of the market was attributable to a design to maintain a monopoly share of the market, that it was not "economically inevitable," and that, as such it violated Section 5.[***]

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[39] Cf. *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 814 n. 21 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977) (dictum); *SmithKline Corp. v. Eli Lilly & Co.*, *supra*, 427 F. Supp. 1089, 1128 (E.D. Pa. 1976), *aff'd*, 1978-1 Trade Cas. ¶ 62,087 (3d Cir. April 3, 1978), petition for cert. filed, 47 U.S.L.W. 3889 (U.S. June 30, 1978) (No. 77-1803); *Quaker Oats Co.*, 66 F.T.C. 1131, 1193-94 (1964) (dictum). We do not suggest, however, a rule which permits a monopolist to price so as to exclude all but equally or more efficient rivals. There must be some room for new entrants which must incur substantial start-up costs (perhaps including intensive advertising) and who cannot be expected to commence production at optimal scale. Moreover, even when not producing at optimal scale, such new entrants may provide significant consumer benefits by selling at prices lower than those offered by a more efficient monopolist which is able to exact a higher price for what may be the identical product because of its trademark.

[40] Respondent expended considerable effort, and consumed over 800 pages of trial transcript, attempting to prove that Golden Crown sold an adulterated product, ostensibly for the purpose of impeaching the testimony of one Golden Crown witness called by complaint counsel. This protracted exercise elicited almost no material evidence in this case (whatever effect it may have had on private litigation between Borden and Golden Crown). We find that that witness' testimony as to general facts about the industry was corroborated by other industry witnesses, and that his estimate of Golden Crown's costs was fairly consistent with Borden's own estimates (ID 195). Thus, we find Borden's contention that "the entirety of this proceeding has been permeated" by the testimony of a perjurer (RAB 47) to be a gross exaggeration. In particular, respondent's statement that "It is simply incredible that the Commission's staff and the ALJ are continuing to give aid and comfort to Hunsfield and his fellow perjurers by continuing the prosecution of this complaint" (RAB 52) goes beyond the bounds of responsible advocacy.

[***] [37a] In its reply brief in support of its appeal to the Commission, Borden attached "Exhibit A," which consists of two charts prepared by Borden or its counsel from sales statistics compiled by A.C. Nielsen, Inc., as explained in an accompanying affidavit. Complaint counsel moved to strike Exhibit A on the ground that the record had been closed nearly one year earlier. Complaint counsel's motion also apparently questioned the reliability of the data reflected in Exhibit A.

Respondent replied to complaint counsel's motion with a counter motion to lodge Exhibit A in the record, to

(Continued)

III. REMEDY

[37] Having found that Borden possessed and unlawfully maintained monopoly power in the processed lemon juice market in violation of Section 5, we must address the question of the remedy to be imposed. As Judge Hanscom noted, citing *United States v. Grinnell Corp., supra*, 384 U.S. at 577:

> In a "monopolization" case, adequate relief must put an end to the monopoly position, and break up or render impotent the monopoly power found to have been preserved and maintained in violation of law.

ID, pp. 162-63. The objective is to take the measures necessary to "pry open to competition a market that has been closed . . . ." *International Salt Co. v. United States*, 332 U.S. 392, 401 (1947). As in all Section 5 cases, the Commission has wide discretion in its choice of a remedy, so long as the remedy selected has a reasonable relation to the violation found. *FTC v. National Lead Co.*, 352 U.S. 419, 428-29 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611, 613 (1946).

Judge Hanscom's order contained provisions barring respondent from using certain pricing practices, and also provided for compulsory licensing of the "ReaLemon" name and label design for a ten-year period. With respect to pricing, Judge Hanscom ordered respondent, in connection with the production, marketing and sale of processed lemon juice, to cease and desist from:

> (1) Granting price reductions, directly or indirectly, which result in different net prices among Borden's ReaLemon customers competing in the same geographic area, the effect of which is to hinder, restrain or eliminate competition between respondent

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which complaint counsel responded. Respondent contended that Exhibit A contained probative evidence relevant to the question whether Borden possessed monopoly power, whether the *ReaLemon* trademark constituted a barrier to entry, and whether the relief ordered by the ALJ was appropriate.

Exhibit A consists of data compiled from Nielsen reports reflecting consumer sales of "selected lemon juices" (ReaLemon, Minute Maid, Golden Crown, Seneca and "all other lemon") for four two-month periods (April-May, June/July, August/September and October/November) in 1976, the record was closed on February 23, 1976, on a dollar and gallonage basis. The apparent purpose of Exhibit A is to show that Minute Maid was able to enter the processed lemon juice market, and to gain a substantial share of that market quickly, while ReaLemon suffered a concomitant drop in market share. (Other producers' shares also fell: Golden Crown from 8.3% to 7.1%; Seneca from 1.8% to 1.3%, and "all others" from 8.2 to 6.9%.)

As a general rule, the presentation of evidence after a case when it can be challenged by opposing parties and considered by the administrative law judge is strongly disfavored. The Commission has, however, in its discretion, decided to judge the exhibit in the record.

Nevertheless, we cannot conclude that the evidence in Exhibit A, based on a two-year old "snapshot" of the market, negates the conclusion that Borden possessed monopoly power in the processed lemon juice market, a conclusion drawn not only from market share, but from a variety of other factors detailed above. Nor does it affect the conclusion that Borden engaged in a variety of exclusionary practices to maintain that power unlawfully. In the first place, such post-trial evidence is highly unreliable, inasmuch as a respondent may create exclusionary practices during the pendency of administrative proceedings (*cf. FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965); *United States v. Continental Can Co.*, 378 U.S. 441, 464 (1964)). The evidence amassed at trial clearly establishes that Borden unlawfully monopolized the processed lemon juice market for many years prior to this proceeding.

Borden and its competitors in the production, marketing and sale of processed lemon juice;

(2) Selling ReaLemon lemon juice below its cost or at unreasonably low prices, the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice; [38]

(3) Granting promotional allowances or payments of any kind for customers' promotional services, the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice.

These provisions are intended to put a halt to the pricing practices described in Section II of this opinion. Although the ALJ did not find that "ReaLemon" was sold below cost, nor do we, we agree that an injunction against such conduct is "reasonably related" to the violation found, and is appropriate relief in the nature of "fencing in." *FTC* v. *National Lead Co., supra,* 352 U.S. at 431.

Subparagraph (3) of the ALJ's order, which is quoted above, deals with promotional allowances which have an adverse effect on competition. However, promotional allowances were the medium by which all the acts and practices used by Borden in its monopolistic scheme, including price discrimination within a single geographic area and selling at unreasonably low prices,[41] were accomplished. Those acts and practices are specifically forbidden in subparagraphs (1) and (2), yet none of the subparagraphs refers specifically to the geographic price discrimination which was the primary means used by Borden to preserve its monopoly position. Thus we will revise subparagraph (1) to prohibit any price discrimination, not justified by cost differentials, that adversely affects competition. [39]

A majority of the Commission is of the opinion that a pricing order, as set forth above, should be sufficient to prevent Borden from unreasonably excluding competition in the processed lemon juice market.[42] While an order requiring licensing or suspension of a trademark may be ordered as a means of dissipating illegally used or acquired monopoly power, we are mindful that the remedy is a severe one, and should be imposed only where less drastic means appear unlikely to suffice *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608 (1946); *FTC* v. *Royal Milling Co.,* 288 U.S. 212 (1933).

In the case before us it seems clear that there have been and remain a significant number of strong competitors willing to enter

[41] Whether a price is "unreasonably low" must be determined by reference to Borden's own costs, its awareness of its competitors' costs, historic price differentials, and competitive conditions in the market.

[42] While Chairman Pertschuk subscribes to the majority's order, he feels that trademark relief should have been ordered as well. His views are set forth in his separate opinion.

the market for processed lemon juice and compete with ReaLemon, in some cases by selling at prices substantially below those charged by Borden. Most barriers to entry, *e.g.*, capital costs, absolute costs, and scale economies, are insignificant. What has deterred significant entry has been Borden's practice of selectively cutting prices at different times and in different geographic markets, to prevent a competitor from gaining more than a token share of particular markets in which a challenge has been made. While the short-run consequences of such actions to the consumers affected may be positive in terms of lower prices, the longer-run consequences are almost certain to be ill, because as soon as the threat of entry vanishes, and as future potential entrants come to recognize the financial disaster that will attend efforts to enter, Borden is free to raise prices back to monopolistic levels and consumers will have lost a meaningful alternative to the monopoly brand.

Under these circumstances, we believe that an order that simply prohibits Borden from pricing to exclude or minimize new entry should be sufficient to dissipate its unlawfully maintained monopoly position, which is the only permissible object of relief in this case. Such an order will allow new or toehold entrants to penetrate markets without fear of the sort of retaliation by Borden that would force such entrants to sell at a sustained loss. Over time, the presence of new brands in the market should provide the competitive alternative that consumers need to determine whether they prefer Borden, at its price, or what seem to be substantially identical alternatives, at substantially lower prices. [40]

Although it may be argued that the pricing order entered herein suffers from the defect of imprecision, it should be noted that this is not an objection that respondent has raised. Perhaps that is because it recognizes, properly, that some imprecision is inevitable in any order of this sort, or perhaps it feels that as a result of such imprecision any order entered will rest lightly upon its shoulders. The latter result, however, is not necessarily an inappropriate one. The purpose of our order, again, is only to prevent the use of short term price changes to exclude meaningful competition, and not to regulate in minute detail the prices or market shares of Borden. As a monopolist it is obliged to refrain from the sort of retaliatory price-cutting that would be allowed a sub-monopolist. Should its monopoly dissolve, however, it is desirable that an order not deter Borden from vigorous price competition, or from enjoyment of the fruits of the trademark it has developed.

In sum, given the competitive climate in the processed lemon juice market, we are not persuaded that a restriction on trademark rights

is needed to curb the unlawfully maintained monopoly. Prohibition of abuse of the trademark that led to this case should be sufficient to encourage the entry necessary to result in a competitive market.[43]

An appropriate order is appended.[44]

Separate Opinion of Chairman Pertschuk on the Issue of Relief

The power inherent in the ReaLemon trademark, and the price premium it permitted, are the root of Borden's monopoly power. Therefore, as Judge Hanscom recognized:

> Enjoining the acts and practices by which respondent knowingly preserved and maintained its monopoly position, and prohibition of a repetition thereof, will not constitute an adequate remedy in this proceeding and end the monopoly power possessed by ReaLemon Foods in the processed lemon juice industry . . . For competition to enter the processed lemon juice industry, the barrier to entry which inheres in the ReaLemon trademark must be eliminated.

ID pp. 163–64. I am not optimistic that the conduct order we are issuing, standing alone, will be sufficient to end Borden's unlawful monopoly hold on the processed lemon juice market.

Courts and the Commission have consistently recognized that in antitrust cases relief should not be strictly limited to preventing a repetition of specific unlawful practices, because the aim is to undo the harm those practices have caused and to permit competition to flourish unimpaired. This is particularly true in monopolization cases, where acts and practices may be lawful in and of themselves, but serve as means for the acquisition and maintenance of monopoly power. As the Supreme Court stated in *Schine Chain Theatres, Inc.*, v. *United States*, 334 U.S. 110, 128 (1948): [2]

> In this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors.

Framing relief that will facilitate effective competition in the

[43] Indeed, if Borden's past hearing assertions are to be believed, the desired consequences may already have been produced merely by the institution of this lawsuit. On the basis of the Nielsen market research surveys, Borden alleges that subsequent to the complaint, Minute Maid has made substantial inroads into its position in various markets. Such evidence suggests that dissipation of the monopoly may not require drastic remedial steps. Should we be wrong in our assessment of the evidence of course, it remains open for the Commission to reopen the record to consider entry of the sort of trademark relief that presently appears unnecessary.

[44] Respondent's "suggestion" that former Commissioner Collier "consider his further participation in this case" is treated as a motion to disqualify and dismissed as moot.

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market is the key consideration. See, *e.g.*, *Ford Motor Co.* v. *United States*, 405 U.S. 562, 573 (1972); *United States* v. *E.I. duPont de Nemours & Co.* 366 U.S. 316, 326 (1961); *International Salt Co.* v. *United States*, *supra*, 332 U.S. at 401 (1947); *United States* v. *United Shoe Machinery Corp.*, *supra*, 110 F. Supp. at 346–47.

The practices utilized by Borden to maintain its monopoly position in the processed lemon juice market were keyed to ReaLemon's substantial price premium, itself the product of a highly effective strategy of product differentiation which created "an almost imaginary superiority . . . in the mind of the consumer" (CX 1, p. 650). The Commission's order and Commissioner Pitofsky's concurring opinion both attempt to formulate remedies which will prohibit Borden from manipulating its pricing so as to frustrate emerging competition. The imprecision of these approaches illustrates the elusiveness of a truly effective conduct remedy for a violation which has a prominent structural component, *i.e.*, the potent trademark. Thus, I feel that a structural remedy is required.[1]

In urging compulsory licensing of the ReaLemon trademark, complaint counsel attempted to draw an analogy to compulsory patent licensing, which is an accepted [3] antitrust remedy. See, *e.g.*, *United States* v. *National Lead Co.*, 332 U.S. 319 (1947); *American Cyanamid Co.*, 63 F.T.C. 1747 (1963), *vacated and remanded on other grounds*, 363 F.2d 757 (6th Cir. 1966). Patent licensing has been ordered to dissipate monopoly power even when the patent has not been misused or implicated in the violation. *United States* v. *United Shoe Machinery Corp.*, *supra*, 110 F. Supp. at 351.

Respondent and the *amici curiae* point out that there are important differences between patents and trademarks. Patents are intended to create monopolies, limited in time, as a stimulus to innovation. The purpose of a trademark is not to create a monopoly, but to designate the source of a product's origin. *Hanover Star Milling Co.* v. *Metcalf*, 240 U.S. 403, 412 (1916). It functions not merely to serve the interest of the seller, but to protect consumers from being deceived as to the source of a product. *Smith* v. *Chanel, Inc.*, 402 F.2d 562, 566 (9th Cir. 1968).

Notwithstanding their general function, which respondent represents to be the antithesis of monopoly, there are cases in which trademarks can serve as instruments of monopoly, and this is such a case. The ReaLemon trademark serves not merely as an identifier of the lemon juice sold under that name, but provides respondent with

[1] Divestiture of stock or physical assets is a common form of antitrust relief that is often appropriate in monopolization cases. *E.g.*, *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911). In this case, however, the relative ease of producing processed lemon juice (ID 9 and p. 166) makes such relief unnecessary.

a mechanism to control prices and entry in the processed lemon juice market, and acts as a formidable barrier to entry.

Professor Scherer has argued persuasively in favor of compulsory trademark licensing as a means of curing the dislocations caused by monopoly. Scherer, *The Posnerian Harvest: Separating Wheat from Chaff*, 86 Yale L.J. 974 (1977) (book review). Scherer aptly states the problem:

> First, no amount of semantic waffling, by Posner or anyone else, can paper over the fact that the possession of a well-received brand image is a form of monopoly power. It permits the firm to elevate its price over its own long-run costs, perhaps by a substantial margin. Second, it seems to me that, at least in the consumer goods industries, image advantages confer a quantitatively important form of monopoly power — perhaps the most important . . . . Third, one may well conclude that the problem is already sufficiently serious that something should be done about it. [4]

Id. at 998-99. The remedy prescribed by Scherer is compulsory trademark licensing. *Id.* at 999-1000.

Respondent contends that the Commission lacks the power to order licensing of a trademark. While the patent licensing analogy advanced by complaint counsel may not be entirely apposite, it does illustrate the range of remedies available to the Commission to restore effective competition to the market. The power of the Commission to implement effective relief is not extinguished by the fact that a trademark is involved. As one commentator has observed:

> When, however, the problem arises of awarding antitrust relief necessary to dissipate the effects of a monopoly, that question [whether a potent trademark is the creature or the cause of a monopoly] becomes academic, because trade-mark relief can be as effective to that end as other types of relief.

Timberg, *Trade-Marks, Monopoly and the Restraint of Competition*, 14 Law & Contemp. Prob. 323, 344 (1949).

This is not to say that compulsory trademark licensing is without problems of its own. Scherer has assessed the benefits and costs:

> The benefit would presumably (although in the present state of knowledge, not demonstrably) be lower prices and reduced outlays on promotion. The costs would be some risk (in my judgment, slight) of weakened quality control, some additional inspection costs to ensure that quality standards are met, a possible loss of scale economies that would be weighed in advance before trademark licensing were decreed, an added information-processing burden on consumers, and a certain amount of violence to traditional property rights. I believe that in numerous cases the social benefits would outweigh the costs.

[5] Scherer, *supra*, 86 Yale L.J. at 999.[3]

[3] I do not agree with Scherer that the remedy does violence to property rights, since it would be applied only in circumstances

The range of trademark remedies is not limited to compulsory licensing. The Commission might also enjoin the use of a trademark for a fixed period. Such an order in this case would strip Borden of the power over price and entry it has been shown to possess, and would permit other firms to compete with Borden on a reasonably equal footing. At the same time, it would not be confiscatory, contribute to consumer confusion, nor enmesh the Commission in questions of quality control and reasonableness of royalties.

The same type of order was issued in *Ford Motor Co.* v. *United States*, 405 U.S. 562 (1972), a merger case decided under Section 7 of the Clayton Act.[3] Ford's acquisition of Autolite, a manufacturer of spark plugs, was held unlawful because it eliminated potential competition and also foreclosed Ford as a purchaser of about 10 percent of industry output. In addition to ordering divestiture of the Autolite spark plug plant, the district court issued a number of injunctions, including one barring Ford from using the Ford tradename on spark plugs for a five year period. The latter provision was justified on the ground that it was necessary to break the so-called "OE tie," which is the tendency of consumers to ask for, and for mechanics to install, the original equipment brand when replacing spark plugs. The court held that permitting Ford to use its own name on OE plugs (even those purchased from the divested Autolite) would make it difficult for a divested Autolite or other competitors to compete in the replacement market. [6]

The Supreme Court upheld the district court's order in full, including the injunction against use of the Ford name. With respect to that provision, the Court explained:

> Ford argues that any prohibition against the use of its name is permissible only where the name deceives or confuses the public. But this is not an unfair competition case. The temporary ban on the use of the Ford name is designed to restore the preacquisition competitive structure of the market.

405 U.S. at 576. (footnote omitted).

If anything, the instant case is even stronger than *Ford* with respect to the appropriateness of enjoining the use of the trademark.

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cases where the trademark, a creature of the law, has ceased to perform its traditional function and has taken on the character of an instrument of monopoly power. The information burden on consumers could be more significant, since it could be argued that a profusion of "Realemons" on the supermarket shelf could lead to consumer confusion. However, to the extent that consumers perceive ReaLemon to be objectively superior to other brands of processed lemon juice, it appears that there is already considerable confusion extant. The quality control and inspection problems averted to by Scherer are not insoluble, but do represent issues which must be carefully considered in applying a licensing remedy.

[3] Similar relief was ordered in *United States* v. *General Electric Co.*, 115 F. Supp. 835, 856 (D.N.J. 1953), the electric lamp cartel case, where General Electric was enjoined from using the "Mazda" trademark in connection with more than one percent of its lamp sales in any year.

In *Ford*, the OE tie was incidental to the violation. The Court found, however, that elimination of the OE tie was necessary to the restoration of competition, and that measures short of enjoining the use of the Ford name would not suffice. Here, the "ReaLemon" trademark and the price premium associated with it are part and parcel of the violation found.

Deception cases have recognized the Commission's power to order firms to cease and desist from using deceptive trade names. *E.g.*, *FTC* v. *Algoma Lumber Co.*, 291 U.S. 67 (1934). In such cases, the Supreme Court has directed that the Commission not prohibit the use of a trade name *unless* less drastic means will not accomplish the same result. *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608 (1946); *FTC* v. *Royal Milling Co.*, 288 U.S. 212 (1933). Here, "less drastic" means may not be effective in fostering competition in the processed lemon juice market, and a limited injunction against use by Borden of the "ReaLemon" trademark may be necessary in the public interest. See McCarthy, *Compulsory Licensing of Trademark: Remedy or Penalty?*, 67 Trademark Rep. 197, 242 (1977).[4]

[7] Thus, I would, in addition to the pricing order issued by the Commission (in which I join), order some form of trademark relief, and would order additional briefing by the parties on the issue if necessary.

Concurring Opinion of Commissioner Clanton

I concur in the Commission's determination that processed lemon juice sold in the United States is a relevant market and that Borden possessed monopoly power in that market. However, I support Commissioner Pitofsky's treatment of the geographic price discrimination charge and I share his belief that inquiry into a monopolist's alleged exclusionary intent is of limited utility in identifying predatory behavior.

I also concur in Commissioner Pitofsky's application of a standard of reasonableness using cost-based considerations to delineate with some degree of precision the bounds of permissible pricing for a monopolist who wishes to respond to competitive forces in the marketplace. A rule which ordains a passive role for the monopolist under these conditions sacrifices both efficiency and consumer

[4] Cf. *United States* v. *Wallace & Tiernan Co.*, 1954 Trade Cas. ¶67,728 (D.R.I. 1954); *United States* v. *A.B. Dick Co.*, 1948-49 Trade Cas. ¶62,254 (N.D. Ohio 1949); *United States* v. *American Optical Co.*, 1949-51 Trade Cas. ¶62,399 (D. Mass. 1949); and *United States* v. *Somerset Co.*, 1948-49 Trade Cas. ¶62,276 (S.D.N.Y. 1949) (consent decrees enjoining defendants from interfering with the use by others of their trademarks (with certain exceptions). In addition, the *A.B. Dick* and *Wallace & Tiernan* orders required dedication to the public of various trademarks).

welfare and is contrary to the overriding goal of the antitrust laws to protect competition, not competitors.[1]

[2] As Commissioner Pitofsky points out, the courts have generally adopted the so-called Areeda-Turner rule[2] in recent cases and have applied a marginal or average variable cost ("AVC") standard in adjudicating predatory pricing allegations. Moreover, where barriers to entry are "extremely high," the courts have indicated a willingness to find monopolization if the monopolist is pricing below its short-run, profit maximizing price.[3] In this regard, Commissioner Pitofsky correctly characterizes Borden's ability to charge a higher price for its product due to brand allegiance as a barrier to entry which must be overcome by a new entrant just like any other start-up cost. But while I agree with my colleague that a predatory pricing rule must take account of the nature of the entry barriers present in a market, I question whether application of a rule other than average variable cost is appropriate or necessary in this case.

In particular, I have trouble with the notion that, where a pronounced consumer preference exists, a monopolist should be precluded from pricing below full cost until the preference disappears (or until the monopoly share is dissipated). Such a rule, in my view, threatens to prolong unduly the interval over which consumers must pay higher prices and during which less efficient firms are sheltered from fair competition. Although I agree with Commissioner Pitofsky and the courts that in appropriate circumstances new entrants must be afforded the opportunity to overcome high entry barriers, I am unwilling to compel a dominant firm to price at a full-cost level for the indefinite period that may be required to fully neutralize a pronounced consumer preference.[4]

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[1] *See Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 853 (9th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3755 (May 30, 1978); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359–70 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *cf. Telex Corp. v. IBM*, 510 F.2d 894, 927 (10th Cir. 1975), *cert. denied*, 423 U.S. 802 (1975).

[2] III P. Areeda & D. Turner, *Antitrust Law* 148–194 (1978) (hereinafter "Treatise").

[3] *International Air Indus., Inc. v. American Excelsior Co.*, 517 F.2d 714, 724–25 n.31 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); ("The lower the barriers to entry in a market, the closer to marginal cost a monopolist would have to set its price in order for a plaintiff to prevail as a matter of law, for we see no social utility in ensuring the survival of inefficient firms where a new entry is possible."); *ILC Peripherals Leasing Corp. v. IBM*, 1978-2 Trade Cas. ¶62,177 (N.D. Cal. 1978); *but cf. Hanson*, *supra* at 1359 n.5 ("There is some question, however, whether pricing below a profit maximizing point which is still above marginal and average variable costs should be considered predatory . . .").

[4] Professor Williamson suggests that twelve to eighteen months is ordinarily sufficient to allow a new entrant to realize cost economies and establish a market identity, noting that a longer period of protection will weaken the incentives of new entrants to quickly achieve cost parity with the dominant firm. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284, 296 (1977). It should be noted that in this case Borden did not respond immediately to Golden Crown's entry and growth. Borden seemed to recognize its peril in 1970, when it noted in its 1971 Marketing Plan that competition was making "serious inroads" and that Golden Crown, Seneca and Tropic Fresh were "causing the most difficulty." (CX 1, pp. 640, 645). Yet, as Commissioner Pitofsky correctly observes (at 16, n.), the timing of Borden's response reflects a degree of restraint on their part. Indeed, Borden's price response to those inroads did not reach its peak until 1973, when its national share had fallen by 6 percentage points and Golden Crown's had risen by 13 percentage points during the preceding three-year period. (CX 1, pp. 652, 691–83).

[3] Apart from my differences with Commissioner Pitofsky over the duration of proposed restrictions on a monopolist's pricing practices, I further believe that it is unnecessary to devise a new rule for the purpose of determining whether Borden monopolized the processed lemon juice market. The Areeda-Turner rule would exclude from variable costs only the following items:

> (1) capital costs (interest on debt and opportunity cost of share capital) attributable to investment in land, plant and equipment, (2) property and other taxes unaffected by output, and (3) depreciation on plant (the life of which is little affected by use). (Footnote omitted) (*Treatise* at 173)

Overhead items as well as advertising and promotional expenses would be included because portions of these expenditures are within the monopolist's control[5] and because it is impossible to identify advertising costs which represent a capital investment in goodwill and overhead expenses which cannot be eliminated in the shortrun.[6] While such an approach obviously [4] includes some fixed costs, I agree with Professors Areeda and Turner that it is better to sacrifice some measure of accuracy for a rule which has greater clarity and which, in its application, does not err in favor of the monopolist.

Utilizing the Areeda-Turner definition of average variable cost, it is unnecessary to include any portion of overhead expense in order to discover pricing below AVC in this case.[7] Adding only advertising costs, other promotional expenses,[8] and all selling expenses for 1973 to those costs conceded by respondent to be variable in nature produces an AVC of $4.10 for ReaLemon shipped to Buffalo and an AVC of $4.18 for product shipped to Philadelphia.[9] Yet in December of 1973, Acme Markets, Philadelphia's price leader and largest retail chain with 20-28% of the market, purchased 1,815 cases of ReaLemon (32 oz. bottles) at a net price of $4.05 per case. (IDF 147, 154, 190) This enabled Acme to sell ReaLemon at $.39 per quart in an area described in Borden's 1973 Marketing Plan as a highly

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[5] *Treatise* at 174. I am unable to adopt the majority's conclusion that Borden's advertising was unrelated to its output in the shortrun. A review of Borden's marketing plans indicates that Borden itself recognized the importance of the advertising/sales relationship (CX 2, p. 667; CX 4, p. 772; CX 4, p. 848).

[6] *Treatise* at 174-74. Areeda and Turner have apparently revised their views on the treatment of advertising expenses since the appearance of their 1975 article. Whereas they initially suggested examination of a company's books to determine whether advertising was classified as a current expense attributable to current sales, they now take the view that variable cost includes advertising and other promotional expenditures irrespective of a monopolist's accounting system. *Compare* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 728 (1975) *with* III *Treatise* at 191.

[7] Inclusion of manufacturing and administrative overhead in the calculation of average variable cost might reveal predatory pricing in other cases (CX 250, Complaint Counsel's Proposed Finding No. 156). Unfortunately, the record does not define overhead with the precision needed to isolate those items considered as fixed costs by Areeda and Turner.

[8] CX 250. Other promotional expenses include promotional materials and similar items. (Tr. 1451).

[9] CX 250, RX 654. Respondent's estimates of actual distribution costs have been used, as well as packing costs for Comstock.

competitive market which ranked third in sales of ReaLemon and contributed 5.5% of nationwide revenue. (CX 3, p. 838) Similarly, Borden sold 2,000 cases of ReaLemon quarts in December 1973 at a net price of $4.05 per case to Niagara Frontier Services, which owns or franchises Tops Markets, the largest volume supermarket in the Buffalo area. (IDF 161, CX 212) Buffalo was, like Philadelphia, an area in which Golden Crown had made substantial inroads at Borden's expense. (IDF 165)[10] Since these transactions can hardly be characterized as inadvertent or insignificant, I am compelled to conclude that Borden illegally acted to maintain its monopoly power and thereby violated Section 5. [5]

A finding of monopolization necessarily compels consideration of whether or not structural remedies are needed to restore competition to the relevant market. However, the potential for consumer confusion associated with various trademark-related remedies cautions against imposing a structural remedy of that nature where there is a reasonable likelihood that market forces, unfettered by predation, will return the market to a competitive status. In the context of the record of this proceeding, I am not persuaded that either compulsory trademark licensing or an injunction against use of the ReaLemon mark is necessary to dissipate Borden's monopoly power. The record here reveals quite clearly that Golden Crown and others made substantial incursions upon Borden's market share up until the deep price cuts of 1973 and 1974. It seems safe to assume that these competitive forces will continue with renewed vigor if Borden is free to price its product no lower than its average variable cost as defined pursuant to the Areeda-Turner rule.[11] Additionally, it is important to reiterate that the record does not permit a definitive determination as to whether Borden's predation was more pervasive than the Philadelphia and Buffalo sales described above.

In view of these circumstances, I would order Borden to cease and desist only from selling ReaLemon lemon juice below its average variable cost, where the effect of such action is to hinder, restrain or eliminate competition between Borden and its competitors. Such adverse effects would be presumed so long as Borden retains monopoly or near monopoly power. I see no need for an additional "fencing-in" provision with respect to promotional allowances since any calculation of price would necessarily be net of such allowances.

[10] On November 20, 1973, ReaLemon National Sales Manager Harold Saxon reported the gains made by Golden Crown earlier in the year in Buffalo and expressed confidence that Borden's holiday promotion would reverse this trend and substantially slow Golden Crown's growth. (CX 91, p. 710)

[11] In reaching this conclusion I give no weight to respondent's eleventh hour attempt to introduce new market share data (see Appendix A of respondent's Reply Brief) which has not been subject to cross-examination by complaint counsel and review by the administrative law judge.

CONCURRING OPINION OF COMMISSIONER PITOFSKY

I agree that Borden illegally maintained a monopoly position in the sale of reconstituted lemon juice in violation of Section 5 of the Federal Trade Commission Act, and I join Parts I and IIA of the majority opinion regarding the definition of relevant markets and the existence of Borden's monopoly power. On the "monopolizing," or conduct, aspect of the case, however, I believe a much narrower ground of decision than is spelled out in the majority opinion should be emphasized. Accordingly, I separately set forth my views on the issue of Borden's maintenance of monopoly power.

Reliance on this narrower ground of decision influences the determination of appropriate remedy and the order that should be imposed to correct Borden's violation.

I. MAINTENANCE OF MONOPOLY POWER

A. *Predatory Intent and Exclusionary Effect.* The question of defining appropriate limits on permissible business behavior by a monopolist is perplexing. On the one hand, monopoly power and the market dislocations it generates (in terms of higher prices, lower output, and the potential for diminished efficiency) is abhorrent to an effective competitive system. *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945); 2 P. Areeda & D. Turner, *Antitrust Law*, ¶403, at 271-272 (1978); L. Sullivan, *Antitrust*, 25-26 (1977). Reflecting these policy concerns, there is sweeping language in several landmark Sherman Act Section 2 opinions suggesting that any willful business behavior which has an exclusionary effect on existing or [2] potential rivals of the monopolist will satisfy the conduct element of Section 2. In *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), the Supreme Court stated that a violation of Section 2 has but two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power. . . ." *Id.* citing, *United States* v. *duPont & Co.*, 351 U.S. 377, 391 (1956). Similarly, in *Alcoa, supra*, the court drew the distinction between a monopolist who had "achieved monopoly" and one who had monopoly "thrust upon it," 148 F.2d at 429, reasoning from the premise that "no monopolist monopolizes unconscious of what he is doing." *Id.* at 432. The court concluded that Alcoa's embracing of each new business opportunity, though honestly industrial, clearly excluded competitors. *Id.* at 431. See also, *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 340-343 (1953).

On the other hand, it is fundamental to Section 2 enforcement that

a monopolist will not be penalized if its success derives solely from its superior skill, foresight and industry. Extraordinary commercial success was distinguished from oppressive or unfair conduct leading to monopoly in the legislative debates attending passage of the Act and only the latter was to be proscribed by Section 2. *United States* v. *duPont & Co.*, *supra*, 351 U.S. 378, 390 n. 15. The distinction has been maintained consistently by the courts. *E.g.*, *United States* v. *Grinnell Corp.*, *supra*, 384 U.S. 563, 570-71 ("willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."); *Alcoa*, *supra*, 148 F.2d 416, 430.

When we try to adopt as economic policy the implications of some of the more sweeping language found in *Alcoa*, *United Shoe*, and *Grinnell*, language which incidentally was almost certainly not necessary to the results in those cases, we find that these eloquent statements are difficult to apply sensibly and consistently. For example, emphasis on the word "willful" in *Grinnell* could suggest that intent is the critical element in determining whether conduct by a monopolist is legal. But when one tries to analyze "intent" in the context of monopoly litigation, it is immediately apparent that intent is an ambiguous indicator. What is the intent of a monopolist when responding to challenge by existing or new competition? Obviously, the monopolist wants to make as many profitable sales as possible, including sales that its new challengers seek, and to retain and [3] expand its market share. It may be aware that if it succeeds fully in repelling the competitive challenge of new rivals, those rivals may exit from the market or be satisfied with a less threatening, marginal market position. But if it achieves its intended aim by acceptable conduct - specifically superior skill or industry in making or marketing the item - the fact that it anticipates or even desires that its rivals will suffer adverse business fortunes hardly seems to be a state of mind that can fairly be the basis of a violation of the antitrust laws.

Language in *Alcoa* and *United Shoe* further suggests that *any* exclusionary business behavior, at least where not economically inevitable, would violate Section 2.[1] That formulation is similarly of dubious assistance when applied to actual business conduct. The problem is that there are many forms of conduct, not economically

[1] The *Alcoa* court concluded that the mere existence of monopoly should not form the basis of a violation of Section 2 if monopoly were "thrust upon" the monopolist. 148 F.2d 416, 429. Judge Wyzanski in *United Shoe Machinery Corp.*, *supra*, 110 F. Supp. 295, 341, interpreted the thrust upon theory to mean that a violation of Section 2 is made out if the exercise of controlling market power (the effect of which is to exclude competition) "though 'honestly industrial' were not economically inevitable but were rather the result of the firm's free choice of business policies."

inevitable, which can have an exclusionary effect, and which it would clearly be unwise policy to deter. A seller may improve its product or sales force and succeed thereby in obtaining additional business. A monopolist may improve its production facilities so as to become more efficient and then pass that efficiency along to consumers in the form of lower prices. Such conduct may actually "exclude" existing or potential rivals, but surely should not be illegal under Section 2.

A fair and effective description of permissible business behavior by a monopolist must proceed beyond loose language dealing with "intent" or "exclusion" and come to grips with the specific conduct engaged in by the monopolist. For example, it is almost certainly legal for a monopolist to obtain a patent or an improvement on its products; on the other hand, it may not obtain a cluster of intricately related patents and erect a wall against challengers. [4] *United States* v. *Hartford-Empire Co.*, 46 F. Supp. 541 (N.D. Ohio 1942), *modified*, 323 U.S. 386 (1945); Cf. 3 Areeda & Turner, *supra*, ¶704b at 115-116. A monopolist may lease or sell its product but cannot engage in a lease-only policy. *United States* v. *United Shoe Machinery, supra; LaPeyre* v. *FTC*, 366 F.2d 117 (5th Cir. 1966) *aff'g. in part Grand Caillou Packing Co.*, 65 F.T.C. 799 (1964). A monopolist may advertise its product but may not engage in massive advertising which erects insurmountable barriers to challengers. *Bailey's Bakery, Ltd.* v. *Continental Baking Corp.*, 235 F. Supp. 705 (D. Ha. 1964).

Patents, leases and advertising may all be intentionally exclusionary, in the sense that they are designed for and have the effect of taking business away from actual or potential rivals, but only certain unjustifiable forms of such conduct have been found to support a finding of monopolizing under Section 2. Ultimately, a description of permissible behavior by a monopolist must take on some of the characteristics of a rule of reason analysis, inquiring beyond intent and exclusionary effect into whether the conduct at issue was *unreasonably* exclusionary or anticompetitive — that is, whether the anticompetitive effects of a practice outweigh its procompetitive consequences, taking into account whether the same procompetitive consequences could have been achieved through a less restrictive alternative. But unlike the conventional rule of reason, this balance will be struck in light of the critical fact that the company engaging in the conduct is a monopolist and that competitive markets are to be preferred over monopoly power in the enforcement of the antitrust laws. *See, Greyhound Computer Corp., Inc.* v. *IBM Corp.*, 559 F.2d 488, 498 (9th Cir. 1977), *cert. denied*, 434

U.S. 1040 (1978). By referencing the rule of reason, usually perceived as a standard to measure the legality of behavior by a sub-monopolist under Section 1, I do not mean to say that permissible behavior by a monopolist is the same as permissible behavior by a non-monopolist. There can be no doubt that otherwise legal behavior becomes competitively unacceptable in the monopoly context. *See, e.g., United States* v. *Griffith*, 334 U.S. 100, 105 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809 (1946).

Assuming a standard incorporating some concept of *unreasonably* exclusionary behavior must be applied to determine whether conduct by a monopolist violates the law, we next turn to the specific question of what *price* behavior is permissible in the monopoly context. [5]

B. *Alternative Rules of Pricing Behavior By a Monopolist.* It frequently occurs that a business rival (sometimes a new entrant) cuts price significantly below the price of a monopolist in order to take away part of its market. Assuming the monopolist responds (as Borden did in the present case) with a price cut of its own, in what circumstances would such behavior violate Section 2 of the Sherman Act or Section 5 of the FTC Act?

1. *Exclusionary and Discriminatory Pricing.* It is possible to argue that a monopolist should not be permitted to engage in responsive price cuts at all when a new, smaller challenger appears on the scene. If a legally mandated supra-competitive price were imposed, the smaller rivals would eventually cut into the market shares of the monopolist until its market position fell below the monopoly level. At that point the monopolist might be free to respond with any otherwise legal price strategy it felt would be effective. An alternative formulation, and one which finds support in the language of *Grinnell* and *United Shoe* (and is relied upon in the majority opinion here) is that a monopolist may not respond to a new challenger by lowering prices [6] strategically in competitive markets.[3] The rule requires that the monopolist not discriminate in price (or as sometimes formulated with the same effect - not earn

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[3] The District Court in *Grinnell* discussed the issue of discriminatory pricing. *United States* v. *Grinnell Corp.*, 236 F. Supp. 244, 257 (D.R.I. 1964), and the Supreme Court affirmed with little more than passing reference to the issue. The Court stated that Grinnell had reduced prices in competitive markets and raised prices in markets in which it faced no competition. 384 U.S. 563, 570. The Court also mentioned with approval, in discussing the appropriate remedy to be determined on remand, that the government proposed to require Grinnell to sell on nondiscriminatory terms. *Id.* at 579.

In *United Shoe Machinery*, there is discussion of United Shoe's discriminatory pricing policy which "led to wide and relatively permanent variations on the rates of return" it secured on different machine types. The Court acknowledged that such discrimination constitutes no common law restraint of trade and though not "predatory, abusive, or coercive was in economic effect exclusionary" and hence a violation of Section 2. 110 F. Supp. 295, 340-41. Interestingly, the Court, citing difficulties in judicial supervision, did not attempt to deal with discriminatory pricing in its order. *Id.* at 349.

different rates of return) between geographic markets or between product categories, and thus that price reductions be across the board.

Both formulations have serious deficiencies. A rule that prevents a monopolist from cutting price in response to new or augmented competition requires the monopolist to wait passively as small, perhaps less efficient arrivals take business away.[3] During this time, consumers who continue [7] to buy from the monopolist are paying higher prices because the law prevents the monopolist from pursuing its own best business interests by instituting price reductions that may be possible due to its efficiency. New entrants protected by a legally mandated umbrella price may themselves charge higher prices than would otherwise be the case - sufficiently below the monopolist price to take some of its business but sufficiently high to make supra-competitive profits themselves. Pursuing this scenario, the whole industry may become economically inefficient for the period of time the administered price umbrella is in effect. Finally, a legally mandated umbrella price generates extremely burdensome administrative problems in supervising the monopolist's pricing policies. Suppose that raw material or labor costs increase for most members of the industry; is the monopolist required to increase its price to consumers on some proportional basis in light of its cost increase in order to avoid a violation? Suppose the monopolist improves the quality of its product. Must a court sit in judgment on the question of what constitutes a fair increase in price to take into account the more attractive features introduced?

A rule that prohibits strategic pricing (to avoid differential rates of return) and requires price reductions to be made uniformly across geographic markets is deficient for many of the same reasons discussed above and also raises additional problems. The rule wholly fails to reckon with the fact that a monopolist usually faces different costs, demands and degrees of competition in different markets. Thus, a monopolist operating nationally or across a wide range of products and confronted with agressive new competition in only one or two competitive markets is caught in a dilemma. It may steer toward Scylla - making uniform price reductions in all markets, including those where a price reduction is not called for from a competitive point of view, or Charybdis - watching without price response as new arrivals capture geographic or product segments of its market.

[3] If the challenger is as efficient as or more efficient than the monopolist, it doesn't need legal protection under most circumstances, as long as the monopolist sells above "cost." At least when "cost" is sensibly defined, it cannot exclude an equally efficient rival.

Taking all of these considerations into account, it seems unwise as a matter of policy and common sense not to let a monopolist respond to some extent to inroads generated by small rivals pursuing aggressive price strategies. The monopolist's price response is itself a wholesome part of the competitive process. Indeed, a major reason that antitrust law in other substantive areas preserves potential [8] competition and prevents the creation of undue and unnecessary barriers to entry is to induce companies with strong market positions to lower price in response to the threat or the presence of new entry.[4]

Assuming flexible price responses by a monopolist are not unreasonably exclusionary in and of themselves, the next question is whether there may come a point at which those price cuts are so substantial or otherwise unreasonably exclusionary as to constitute illegal monopolization.

2. *Cost-Based Rules of Predatory Pricing.* In an influential article on the question of predatory pricing, Professors Areeda and Turner have argued that predatory or exclusionary pricing by a monopolist should be assessed by a series of cost-based rules. P. Areeda & D. Turner, *"Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,"* 88 Harv. L. Rev. 697 (1975). The most important of these rules states that a monopolist should be held to violate Section 2 only where it sells "below cost," defining cost as average variable cost.[5] The authors assert that a firm which is selling at a short-term [9] profit-maximizing price is clearly not a predator even though it may be selling below its full cost. On the other hand, when a firm sells at less than average variable cost, it is taking an out of pocket loss on each unit sold. Excluding very special situations such as where the seller (though a monopolist) may be going out of business, such conduct can only be explained as part of the strategy to drive rivals out of business, and then recoup the earlier losses with higher than competitive prices. Also, sales at such low prices raise the spectre that success in the market will depend not on the relative efficiency of rivals but on which seller has a sufficiently long purse to subsidize these unit-by-unit competitive losses. Thus, a price at or

[4] For example, Section 7 of the Clayton Act has been interpreted to proscribe mergers whose effect may be substantially to lessen potential competition. *E.g., Procter & Gamble Co. v. FTC*, 386 U.S. 568 (1967); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

[5] The authors suggest the use of average variable cost as a surrogate for short-run marginal cost which is believed to be a truer measure of economic cost but virtually impossible to calculate. Average variable cost is the sum of all variable costs divided by units of output. Variable cost is cost which varies with changes in quantity of output and is a function of size of output change and time. Variable cost is contrasted with fixed cost which is theoretically constant irrespective of quantity of output. Full or total cost is the sum of fixed and variable costs. P. Areeda & D. Turner, *Predatory Pricing and Related Practices Under Section 2 of The Sherman Act*, 88 Harv. L. Rev. 697, 700, 716-718. Unfortunately, there is no unanimous view of the correct allocation between fixed and variable costs, nor given the elusive nature of these calculations is there likely to be one.

above average variable cost is presumed lawful; a price below is conclusively presumed unlawful.

This formulation has the considerable virtue of offering a single bright line formulation which would provide guidance as to permissible behavior to businessmen and also guidance to the courts and enforcement agencies. Several courts of appeals and district courts, in part influenced by the Areeda-Turner formulation, have recently adopted the below average variable cost rule to test for predatory pricing *See, Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 47 U.S.L.W. 3195 (Oct. 2, 1978); *Pacific Engr. & Prod. Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert denied*, 98 S. Ct. 234 (1977); *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 813 (1977); *International Air Inds.* v. *American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), cert denied, 424 U.S. 943 (1976); *ILC Peripherals Leasing Corp.* v. *IBM*, [1978-2] Trade Cas. ¶62,177 (N.D. Cal. 1978); *Weber* v. *Wynne*, 431 F. Supp. 1048 (D. N.J. 1977); *Inter City Oil Co.* v. *Murphy Oil Co.*, [1976-1] Trade Cas. ¶60,948 (D. Minn. 1976).

A different cost-based rule is suggested by Professor Posner, who would define predatory pricing below short-run marginal (*i.e.*, average variable) cost, *or* as "pricing at a level calculated to exclude from the market an equally or more efficient competitor." R. Posner, *Antitrust Law: An Economic Perspective*, 188 (1976). He would adopt a rebuttable presumption that predation is selling below long-term mariginal cost with intent to exclude a competitor, with average *total* costs serving as a reasonable proxy for long-term marginal costs. *Id.* 189-190. A defendant could rebut the prima facie case of predation by showing, because of changes in supply or demand, that its average total costs [10] were different than long-run marginal costs or that short-run marginal costs were the correct guide to efficient pricing. *Id.* at 190-191. This formulation apparently is predicated on the belief that a short-run marginal cost, or average variable cost, rule would be too permissive and would allow a monopolist to eliminate a competitor whose long-run costs might be equal to or lower than the monopolist's.* Short-run costs are invariably lower than long-run because the former may not include a variety of past expenses which have become fixed costs for existing competitors but are yet to be incurred by the new entrant.

Several courts have recognized the problem spotlighted by Posner and attempted to deal with it by adopting a two-step test for predatory pricing. The first standard to determine predation is

* For a similar statement see A. E. Kahn, *The Economics of Regulation: Principles and Institutions* 45 (1970).

whether price is below marginal or average variable costs - the Areeda-Turner formulation. Even if it is not, a violation can occur if price is below average total costs and barriers to entry are high. *International Air Industries, Inc.* v. *American Excelsior Co.*, *supra*, 517 F.2d 714, 734; *ILC Pheripherals Leasing Corp.* v. *IBM*, *supra*, ¶62,177 at 75,256-57. The theory appears to be that if entry barriers are high, a monopolist can drive equally efficient or nearly as efficient rivals out of business (or cow them into a complaint posture through price wars), and then raise its price to above competitive levels and reap monopoly profits before new entry can restore a competitive market.[7] [11]

Before assessing whether the average variable cost line is appropriate to determine what conduct is unreasonably exclusionary, it is essential to examine carefully and precisely the market conditions that Borden faced and the competitive tactics that it pursued.

C. *Borden v. Golden Crown - Competitive Responses.* As noted earlier, the record shows that Borden enjoyed a dominant market position throughout the period under review - that is, from 1969 through 1974. In late 1969, ReaLemon accounted for about 90 percent of national sales (ID 102),[8] with several smaller brands active in regional markets. Beginning about that time, however, Golden Crown began to expand from its midwest base and progressively penetrated markets in the east, northeast and southwest (ID 103). Since retailers usually carried only two brands of processed lemon juice - ReaLemon plus one other brand - it was predictable and not unusual that Golden Crown's early gains resulted principally in losses to the other small regional manufacturers (ID 104).

By mid-1970, however, Borden's ReaLemon brand was beginning to suffer some encroachment. Borden's 90 percent market share had fallen to 88 percent, and Borden had correctly identified Golden Crown as its major new competitive rival (ID 108). Golden Crown was enjoying some success because it was selling at retail for prices anywhere from 10 to 30 cents per bottle below ReaLemon (ID 115); for example, its 32 ounce size sold for 47 cents while ReaLemon sold for 61 cents (ID 121). Recognizing that Golden Crown's aggressive competitive stance plus the existing price spread would lead to a

[7] Several other variations have been offered. See F. M. Scherer *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869 (1976) and O. E. Williamson *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L. J. 284 (1977). Both approaches regard the average variable cost approach as rigid and simplistic and offer alternative assessments of unreasonably exclusionary pricing.

[8] ID 102 refers to the numbered paragraph of the initial decision containing the administrative law judge's findings of fact.

continuation of market share loss, Borden turned to a consideration of what its competitive response should be.

In 1971 and 1972, Borden supported ReaLemon with substantial advertising revenues and also cut its price to retailers through substantial trade promotions. Nevertheless, its market share continued to fall; it held 86.5 percent of the market by the beginning of 1973. In 1973 and 1974, Borden expanded its advertising activities and also increased its promotional allowances substantially - increasing the retailer margin to all outlets, including those that did not cut price, and, in some cases, producing a lower consumer price because retailers passed along some of the promotional allowances to consumers. Moreover, by 1974, Borden had moved to an approach of giving heavy promotion support for sales of ReaLemon in four key markets where it faced Golden Crown competition - New York, Philadelphia, Chicago, and Detroit (ID 123). [12]

By 1974 its advertising and promotional monies were double the amount available to retailers in 1967 (ID 125). As will be discussed more fully below, in some instances these allowances were so substantial as to bring Borden into the range of its average variable costs.

According to the trial judge, the record does not support findings that Borden at any point during these sales promotions sold ReaLemon at less than its average variable cost (ID 192). The lowest prices Borden offered were to the Niagara Frontier stores in Buffalo in 1973 where it sold at $4.05 a case and to Acme Supermarkets in Philadelphia in 1973 where it also sold at $4.05 a case (ID 187, 190). Average variable costs on ReaLemon delivered in those sales was $3.75 or $3.99 in the Buffalo transaction, and $3.83 or $3.99 on the Philadelphia transactions (depending on which of two allocation formulas for shipping costs is applied) (ID 187, 191).*

Although Borden may have been selling ReaLemon at more than its average variable cost, it does not follow that its price maneuvers were inadequate to blunt and eventually eliminate Golden Crown's challenge. The key to Borden's success (and the key to disposition of this case in my opinion) turns upon the fact that ReaLemon enjoyed a pronounced consumer preference which enabled it to hold its large

* Borden's ReaLemon price exceeds its average variable cost only because the trial judge treated advertising as a fixed expense that contributing any cost whatsoever to Borden's variable costs and because substantial elements of salesmen's salaries and administrative sales costs other than direct commissions on sales of ReaLemon were also treated as fixed rather than variable. I am doubtful that these represent defensible allocation decisions. For example, with respect to advertising, Borden itself treated advertising as a variable expense in its own bookkeeping system (ID 175) and as discussed above, advertising was very much a strategic weapon used by Borden during the price war in the pursuit of its competitive goals.

Despite these doubts, I will accept the trial judge's interpretation on these points and hence assume that Borden did not sell at less than average variable cost.

market share virtually intact even though it was selling in the marketplace at a substantially higher price than its [13] small regional competitive rivals. This differential represented a "premium" that consumers were willing to pay in order to get the "big name" brand; and unless a challenger to ReaLemon made certain that its "new brand" sold at a price sufficiently below ReaLemon to make up for this consumer preference, the new brand could not compete with ReaLemon at all. Assuming that consumer preference at least to some extent persisted during the period of the price war, and Borden sold at a price close to its average variable costs, a challenger like Golden Crown which was approximately as efficient as Borden[18] would have to sell far below its own costs in order to maintain all or a substantial part of that price differential. Thus, the record shows that if Golden Crown were only to maintain a 10 cent price differential below ReaLemon on the 32 oz. bottle (about 5 cents less than the differential that existed at the beginning of the price war), Golden Crown would have to make its product available to retailers at $2.90 a case, fully a $1 per case below Borden's average variable cost (ID 198). To maintain a 5 cent differential in the marketplace, Golden Crown would have to make its product available to retailers at $3.40, about 50 cents below Borden's average variable cost. Clearly, this is a formidable obstacle for a new rival to surmount in order to withstand Borden's pricing response.

D. *Borden's Unlawful Pricing Policies.* The majority finds that Borden monopolized in violation of Section 2 because it answered Golden Crown's challenge with specific competitive responses intentionally designed to curtail the ability of that company to compete effectively in the market, and because it resorted to geographic price discriminations, selling at prices close to cost in markets where Golden Crown was active but maintaining much higher prices in less competitive markets. (Majority opinion at 22-32.) There is persuasive evidence in the record that supports both these findings, and substantial legal precedent for a conclusion that such behavior constitutes illegal monopolization.

I am hesitant, however, to rely on principles of intent for a finding of monopolization since intent in these cases is almost always multifaceted and uncertain, and should properly be relied upon only in the most unusual and rare circumstances. A finding of monopolization based on geographic price discrimination can be criticized as an unreasonable hampering of the monopolist's ability to compete and an economically unrealistic solution. [14]

[18] Actually, Golden Crown's costs were very close to, if not below, Borden's (ID 195). See majority opinion, p. 30.

Even if neither of those grounds were regarded as adequate to sustain a finding of a violation, there is another aspect of Borden's market behavior which demonstrates clearly that its conduct was "unreasonably exclusionary" in light of its monopoly market position. A realistic appreciation of the nature of competition in this market begins with the recognition that Borden, prior to Golden Crown's challenge, was able to sell at a price that was 30 percent and more higher than prices charged by regional competitors (ID 82). This pronounced consumer preference was largely a result of the fact that Borden had been in the market for many years before Golden Crown appeared,[11] possessed overwhelming brand recognition and consumer loyalty simply by virtue of having been in the market for so long, enjoyed the continuing benefits of its prior advertising, and had established itself over the years through sales promotions and otherwise cordial relations with retailers.[12]

Many of these advantages, particularly brand recognition and brand loyalty induced by advertising, were achieved through the expenditure of monies which did not constitute a current cost to Borden in the years in which it was engaging in price competition with Golden Crown. As a consequence, even though Golden Crown was equally as efficient or more efficient than Borden, Borden could drop its ReaLemon prices to a point at or slightly above its average variable cost, maintain those prices over an extended period of time as a result of its enormous sales and asset position in other product lines, and be assured that it would eventually drive Golden Crown or any other similar challenger to the wall. Thus, where a monopolist enjoys a pronounced consumer preference due to advertising and promotion, a rule which permits [15] the monopolist to drop its price to average variable cost in response to competitive challenge in effect means the monopolist will surmount almost any competitive challenge from smaller entrants. A definition of exclusionary pricing which results in preferring a monopolist for no reason other than it is a monopolist, and disadvantaging a small company not because it is less efficient but because it is a new entrant and because it is smaller, stands antitrust policy on its head.[13]

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[11] There is a striking contrast between the ways Borden and Golden Crown entered the market. Borden acquired a monopoly in 1962. The predecessor company had the sole nationally advertised and distributed brand for 30 years prior to Borden's acquisition, and Borden maintained this status for 10 years before Golden Crown entered. The "ReaLemon" trademark had been in use for 30 years by this time.

[12] Borden's brand preference was not the result of a superior product. Borden's documents showed and Judge Hanscom found that the price premium was due to image not product superiority (ID 83).

[13] Professor Scherer arrived at the same conclusion, *i.e.*, that the average variable cost formulation for illegal monopolizing is inadequate when the monopolist enjoys a significant consumer preference. "An image advantage, permitting the maintenance of a price premium, is conceptually analogous to a unit cost advantage. Either enhances the dominant firm's incentive to cut prices temporarily to exclude less-favored rivals. What society obtains following successful image-induced exclusionary pricing is not the freeing of resources that can be

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Assuming that a simple formula that defines predatory pricing as sales below average variable costs results in an anticompetitive result where a monopolist enjoys pronounced brand allegiance, what alternative rule should be imposed. Specifically, what should Borden have done once its market position was challenged to avoid an unreasonably exclusionary response?

The statement of the problem provides a strong indication of the solution. Since Borden's entrenched advantage derived from brand loyalty that permitted the charging of a substantial premium price, it was unreasonably exclusionary to have narrowed the gap between itself and a new challenger [16] so as to eliminate wholly or substantially the previous premium margin - at least while it continued to enjoy a monopoly market share. A correct rule must take into account the past expenditures which enabled Borden to achieve its current monopoly position - that is, advertising, promotion and distributional expenses, and perhaps the premium it paid in the first place to acquire a monopolist (which itself may reflect prior variable cost expenditures which have a current marketplace impact). These past expenses to some extent permit Borden to charge a premium price, and yet would not be included in its average variable costs.

This is not to say that no price response by a monopolist is permissible. For example, a price cut to average full cost would be a restrained and moderate competitive response - particularly if introduced slowly and progressively over a period of time.[14] Under this standard, the monopolist [17] would be able to respond selectively to competitive challenges down to its level of average full cost, but ordinarily would not be able to drive an equally efficient challenger out of the market.[15] If the challenger is highly inefficient in comparison to the monopolist even this moderate response should

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employed more effectively elsewhere, but rather, higher prices and profits accompanied by increased consumption of the "premium" product. Assessing the social efficacy of such cases calls for strong non-economic value judgments.

I believe that the image advantage - exclusionary pricing is empirically important, and I find it hard to avoid a value judgment that temporary price cutting to eliminate producers handicapped only by an inferior brand image is socially undesirable." Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869, 869 (1976).

[14] Another element of "restraint" by monopolists enjoying a consumer preference position might be not to cut price drastically (i.e., below average total cost) in the first year or eighteen months on which a challenger is present in the market. That too could be unreasonably exclusionary in that it may have the effect of eliminating or crippling the competitive potential of the challenger before it has an opportunity to seek consumer acceptance, differentiate its product, or achieve for itself efficiencies of scale that it could ultimately attain. Cf. O. Williamson, *supra*, 87 Yale L. J. 285, 296.

Borden's progressively more vigorous price and advertising responses to Golden Crown, running over a period of four years, do not indicate a lack of restraint with respect to this *timing* dimension. But as the case demonstrates, restraint in timing of the monopolist's response to competition, standing alone, is not sufficient to make the response reasonable.

[15] The full cost rule may find support in the Posner approach (Posner, *supra*, pages 185-90), since it would prevent pricing at less than full cost to exclude an equally efficient rival. The limitation on monopolist's discretion would continue only so long as there is a pronounced consumer preference. If it disappeared in the course of

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allow the monopolist to protect its legally acquired market position. If the monopolist's product is superior, or its brand image impervious to price competition, it may hold its market share at the higher price. Finally, if the challenger is an equally or more efficient competitor than the monopolist, the monopolist's market share should soon decline to the point where it may respond competitively under more lenient rules that apply to non-monopolists. The time lag before that occurs should allow the challenger sufficient opportunity to become established in the market, and then to meet the former monopolist's response on its merits.[18]

[18] The approach adopted here, by departing from a standard of predation depending on average variable cost in all instances, introduces some uncertainty into the law. That is unavoidable, however, if we are to apply to a monopolist's business behavior those judgmental factors inherent in a rule of reason. As noted, the problem here is that the way in which costs are computed failed to account for a major advantage of a monopolist which does not relate to its superior skill, foresight, or industry nor to quality differences between its product and the product of rivals, and yet serves mightily to preserve its monopoly position.

The proposed rule is not inconsistent with recent cases which have reacted approvingly to the notion of defining predatory prices in most situations as those that are below average variable cost. Thus, in *Hanson* v. *Shell Oil Co.*, 541 F.2d., 1352 (9th Cir., 1976), the owner of a group of small gasoline stations charged Shell with predatory pricing designed to drive competitors out of the market. The 9th Circuit adopted the average variable cost formula for predatory pricing, explaining its decision in the following language:

> If its prices were above its costs, and nevertheless Shell's did drive Hanson out of business this can only be because Hanson was so inefficient that at prices which Shell could make a reasonable profit, he could not. The antitrust laws were not intended, and may not be used, to require businesses to price their products at unreasonably high prices (which penalize the consumer) so that less efficient competitors can stay in business. 541, F.2d at 1358–59.

It is precisely because Borden's price above average variable cost could drive an equally efficient rival out of business that an average

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renewed competition (which is another way of saying challengers had overcome barriers to entry depending on the monopolists successful product differentiations), then there would be no need for special rules limiting the monopolist's price response beyond those that would apply in any monopoly situation.

[18] While it is not necessary to address the question here, the same general approach should apply where a company takes advantage of pronounced consumer preferences, generated by previous expenses not included in current average variable costs, to achieve monopoly power at the expense of equally efficient competitors. There too, a sensible rule must find a way to take into account those prior expenditures which made it possible for the company to master its rivals and gain or regain a monopoly position.

variable cost formula is inappropriate where there is pronounced consumer brand loyalty. [19]

Several other cases adopting an average variable cost formulation to define predation, have considered whether high entry barriers were present and thus warranted an exception to the average variable cost rule. *International Air Industries, Inc.* v. *American Excelsior Co., supra,* 517 F.2d 714, involved the air conditioning cooler pad industry. The court found no reason to depart from an average variable cost rule unless "barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible." *Id.* at 724. It was concluded that entry barriers were non-existent and that defendant had not sold below its average cost in any event. *Id.* at 725. In *ILC Peripherals Leasing Corp.* v. *IBM* ("Memorex"), *supra,* [1978-2] Trade Cas. ¶62,177, the court determined that entry barriers were not overly high and that there was no evidence that IBM had sold below a short-run, profit-maximizing price. *Id.* at 75,257. In *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp., supra,* 551 F.2d 790, 797, the Tenth Circuit adopted an average variable cost rule rejecting a below total cost rule under the circumstances of the case. The case involved sale of a chemical used in solid rocket fuel for which there was dramatically decreased demands. The industry had gone from four to two suppliers, each of which had a capacity exceeding total demand. The court concluded that it was inevitable that only one company would survive.

In *Janich Bros. Inc.* v. *American Distilling Co., supra,* 570 F.2d, 848, 856–58, the Ninth Circuit adopted an average variable cost rule and discussed the shortcomings of using a total cost rule. The court stated that "As implied in *Hanson,* an across-the-board price set at or above marginal cost should not *ordinarily* form the basis of an antitrust violation." *Id.* at 557 (emphasis added). The *Memorex* court properly construes the statement as indicating that the exception for a market with high entry barriers is still the rule of the Ninth Circuit. [1978-2] Trade Cas. ¶62,177 at 75,757.

Since pronounced consumer brand loyalty is a barrier to entry, the line of cases described above would also counsel a departure from the average variable cost rule here. [20]

There remains only the question whether Borden sold below average total cost during the period under review, and there appears to be no doubt that it did. According to Borden's own internal documents, Borden's total cost for cases of 32 oz. ReaLemon lemon juice during 1973 was $6.09 or $5.93 (depending upon direct or non-direct shipment) (CX 293; ID 172). As previously discussed (page 12),

Borden's price for sales promotions in Philadelphia and Buffalo at this time was $4.05 per case. These sales were well below total cost, and, in fact, were only 6 to 30 cents above average variable cost. Moreover, these sales were not isolated instances. There was evidence that during 1973, 84 percent of Borden's 32 oz. ReaLemon lemon juice was sold "on deal"; that is, with promotional allowances (ID 133). Allowances in Borden's competitive markets in 1973 commonly ranged from $1.50 to $2.25 per case (ID 139, 141, 142, 143). Deducting these allowances from the average net selling price per case in 1973 of $6.59 (CX 293), leaves selling prices of $4.34 to $5.09. Thus, it is clear that there were many sales below total cost.

II. REMEDY FOR BORDEN'S PREDATORY CONDUCT

I agree with the conclusion in Chairman Pertschuk's separate opinion that the Commission has the authority under Section 5 to enjoin continued use of a trademark where that injunction is necessary to dissipate monopoly power that has been illegally acquired or used. In light of the reasoning of this concurring opinion, however, I would conclude that such extraordinary relief is unnecessary.

An order preventing Borden from pricing ReaLemon at levels which would be "unreasonably exclusionary" - as that term is described in this opinion - would allow new entrants, regardless of their size and access to financial subsidies, to compete effectively with Borden if their level of efficiency so permitted. I am in general agreement with the majority's order. In light of the reasoning of this opinion, I would, however, modify the order by deleting subparagraph (1) in its entirety. As noted previously, I do not subscribe to a geographic market or product market, price discrimination theory of monopolization. [21]

I believe the monopolist should be accorded some leeway to respond to aggressive competition by a new entrant or an existing competitor. The response must be tempered, however, so as not to eliminate the equally or more efficient competitor. Subparagraph (2) of the order will accomplish this end in this market (and will accomplish that end in most competitive situations). I would define "unreasonably low prices" as sales below average total cost. This limit would apply — *i.e.*, would be necessary to avoid a restraint or elimination of competition — only so long as Borden continued to exercise monopoly power.

Lastly, subparagraph (3) directs that Borden cease and desist from promotional allowances which eliminate competition between Borden and its competitors. This provision recognizes that promotional

allowances, along with advertising, functioned as the primary means through which Borden maintained its monopoly position. Some provision addressing promotional practices, beyond subparagraph 2, is warranted as a "fencing-in" provision. *FTC* v. *National Lead Co.*, 352 U.S. 419, 431 (1957). In light of Borden's violation of Section 5, that provision should impose greater restriction than is required by subparagraph (2) but nonetheless, permit Borden to respond moderately to a new challenger. Therefore, I agree with subparagraph (3) of the order.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying opinion having determined to sustain the initial decision with certain modifications:

It is ordered, That the initial decision of the administrative law judge, pages 1-162, be adopted as the findings of fact and conclusions of law of the Commission, except to the extent indicated in the accompanying opinion.

Other findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered: [2]

ORDER

It is ordered, That Borden, Inc., and its successors and assigns, officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, affiliate, division or other device, in connection with the production, marketing and sale of processed lemon juice in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

(1) Granting price reductions, directly or indirectly, which result in different net prices among Borden's ReaLemon customers, whether or not such customers compete in the same geographic area, which differences in price are not attributable to differing costs of manufacture, sale or delivery, and the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice;

(2) Selling ReaLemon lemon juice below its cost or at unreasonably low prices, the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice;
(3) Granting promotional allowances or payments of any kind for customers' promotional services, the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice. [3]

It is further ordered, That Borden, Inc., shall, within sixty (60) days from the date this order becomes final, and every year thereafter for a period of ten (10) years, submit a detailed written report of its actions, plans and progress in complying with the provisions of this order, and fulfilling its objectives.

Initial Decision by Daniel H. Hanscom, Administrative Law Judge

August 19, 1976

I

Statement of the Case

Allegations of Complaint

The complaint in this proceeding issued in July 1974 charging respondent Borden, Inc. with maintaining monopoly power over the marketing and [2] sale of reconstituted lemon juice through ReaLemon Foods, a unit of its Borden Foods Division, in violation of Section 5 of the Federal Trade Commission Act. More specifically, the complaint charged respondent Borden with using its dominant position, size and economic power to frustrate the growth of smaller reconstituted lemon juice marketers, to reduce their opportunities for survival, and to prevent, hinder and lessen competition in the

sale of reconstituted lemon juice. As a consequence of the foregoing and other enumerated acts and practices, respondent Borden was charged with (a) monopolizing the reconstituted lemon juice market, (b) preserving, maintaining, and furthering a highly concentrated market structure, (c) hindering, restraining, foreclosing, and frustrating competition in the reconstituted lemon juice market, (d) increasing entry barriers in the reconstituted lemon juice market, and (e) depriving consumers of the benefits of free and open competition.

The "relevant market," as indicated, was alleged to be the marketing and sale of reconstituted lemon juice in the United States and regions thereof. Industry sales of reconstituted lemon juice were stated to be approximately $25,000,000 in 1973, and respondent's ReaLemon brand was alleged to account for approximately 80 percent of such sales.

Borden's answer, filed August 22, 1974, denied all allegations of unlawful competitive conduct or that it had violated Section 5 of the Act. Respondent denied that reconstituted lemon juice was a relevant product market, that it had engaged in any of the specific acts and practices alleged, or that it had restrained trade or maintained a noncompetitive market structure in the sale of reconstituted lemon juice. [3]

Procedural History

Pretrial proceedings commenced shortly after the filing of Borden's Answer with a conference held August 28, 1974, and continued thereafter with extensive discovery and trial preparations by both sides. A number of motions were filed and ruled upon by the law judge, and several additional pretrial conferences were held to iron out various problems which developed. Hearings on the merits were originally scheduled for February 18, 1975, but that date proved to be impractical and they were reset for May 27, 1975. The case-in-chief commenced on that date in Chicago, Illinois, and thereafter hearings were held there and in Washington, D.C. and Los Angeles, California.

The trial required in all seven weeks of actual hearings, including rebuttal which was concluded on February 3, 1976. Many industry and other witnesses were called, and both sides presented extensive expert economic and marketing testimony. Complaint counsel called Dr. Michael Mann, Professor of Economics at Boston College and former Director of the Bureau of Economics of the Commission, and Drs. Warren Greenberg and Daniel P. Kaplan, economists from the Commission's Bureau of Economics. Respondent Borden called Dr.

William F. Massy, Professor of Business Administration and Vice-Provost for Research at the Graduate School of Business, Stanford University, and Dr. Morton Kamien, Professor of Managerial Economics at the Graduate School of Management, Northwestern University. In all 74 witnesses testified. When hearings were completed the transcript amounted to 6,189 pages, and twelve binders of exhibits had been accumulated numbering several thousand pages. The record was closed February 23, 1976. The initial decision was originally due May 21, 1976, but the complexity of this matter combined with another decision then being completed by the undersigned necessitated extensions of time which were granted by the Commission. [4]

The proceeding is now before the undersigned for decision based upon the allegations of the complaint, the answer, the evidence and the proposed findings of fact, conclusions and legal authority filed by both sides. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein, are rejected. The law judge, having considered the entire record, and all the contentions of respondent Borden and complaint counsel, makes the following findings and conclusions, and issues the order set out at the end hereof:

II

Findings of Fact

Respondent

1. Respondent Borden is a New Jersey corporation with its executive offices at 277 Park Ave., New York, New York. Among its divisions is the Borden Foods Division which is headquartered in Columbus, Ohio (Complaint and Answer, Paragraph Two; Dillon, Tr. 4840).

2. The ReaLemon-Puritan Company, based in Chicago, Illinois, was acquired by Borden in 1962, and thereafter has been operated as ReaLemon Foods, a separate unit of the Borden Foods Division. The principal product of ReaLemon Foods is ReaLemon brand of reconstituted lemon juice (Complaint and Answer, Paragraphs Three and Four).

3. Respondent Borden, Inc. is a major U.S. corporation with total sales of over $2 billion annually, total income after taxes of $66 million in 1972 and assets of around $1.3 billion. In 1973, total sales of ReaLemon Foods were approximately $28 million of which $22

million was reconstituted lemon juice (Complaint and Answer, Paragraph Four). [5]

4. At all times relevant herein, Borden has sold reconstituted lemon juice in various parts of the United States and was, and is now, engaged in "commerce" as "commerce" is defined in the Federal Trade Commission Act (Complaint and Answer, Paragraph Eight).

Market Definition

As a predicate for determining whether respondent Borden, as charged in the complaint, has "maintained monopoly power over the production, distribution or sale of reconstituted lemon juice," it is obviously necessary first to identify both the "relevant geographic market" and the "relevant product market."

Geographic Market

5. The geographic market within which to test the allegations of the complaint is the United States as a whole. Respondent Borden's ReaLemon bottled lemon juice is marketed nationally and competed with similar products in most of the country. Although valid geographic submarkets may exist, the record clearly establishes the existence and validity of a national geographic market (see, for example, CX 1, pp. 638–39; CX 2, pp. 660, 678, 707; CX 3, p. 740; CX 258).

Product Market

6. From the inception of this proceeding the composition of the relevant product market has been a paramount issue. Respondent Borden has contended throughout that any relevant market definition must include fresh lemons at a minimum. A major part of the case was devoted to documentary and testimonial evidence, some of it highly complex econometric analysis, on this issue. Complaint counsel, on the other hand, maintain that, although the "outer boundaries" of a broad product market may include [6] fresh lemons, a variety of practical factors, including product characteristics and "economic and commercial realities," establish that "processed lemon juice," described later herein, constitutes a valid submarket. After thorough consideration of the evidence and applicable legal principles on this question, the law judge, in accordance with the findings and reasoning set out hereinafter, has concluded that complaint counsel's contention is correct and that processed lemon

juice is, at the least, a proper submarket within which to test respondent Borden's competitive conduct.

Fresh Lemons

7. Little need be said about fresh lemons, they are known to all. Unlike other citrus fruit, however, fresh lemons are used mainly for their juice and as a garnish. Fresh lemons grow the year around, and are available at all seasons (Lee, Tr. 5079; Bohrens, Tr. 5071). California is a principal producer, although lemons are also grown elsewhere, including Arizona and Florida. Fresh lemons are perishable in a relatively short time. Estimates of the shelf-life of unrefrigerated lemons ranged from 5 to 7 days up to three or four weeks (Goldberg, Tr. 2630; Heller, Tr. 5018; Greenberg, Tr. 1202-1203; Imming, Tr. 4603), and under refrigeration at the proper temperature, six to eight weeks (Lemmerman, Tr. 981). Dollar sales of fresh lemons approximate $200,000,000 yearly (Fey, Tr. 3970).

Processed Lemon Juice

8. Processed lemon juice includes the following different varieties: reconstituted lemon juice, frozen reconstituted lemon juice, processed fresh lemon juice, frozen fresh lemon juice, and imitation lemon juice (Dr. Greenberg, Tr. 2801). As indicated earlier, the complaint alleged the relevant product [7] market to be "reconstituted lemon juice," but during the proceeding, and later in proposed findings and briefing, complaint counsel shifted to "processed lemon juice" which describes a slightly broader product market. Significant market share data is in terms of processed lemon juice (CX 239), although most of the evidence offered by complaint counsel relates to reconstituted lemon juice. Bottled reconstituted lemon juice, which is the product marketed by respondent under its ReaLemon brand, is overwhelmingly the dominant type of processed lemon juice, and comprises the bulk of the processed lemon juice category (see the testimony of Dr. Greenberg, particularly Tr. 2794 through 2806, Tr. 2846-47, CX 239, and CX 1 through 4 generally). Whether the relevant market is formulated in terms of "reconstituted lemon juice" or "processed lemon juice" makes no material difference in the outcome of this proceeding. Both of the foregoing terms, as well as "bottled lemon juice," were used to describe the industry in respondent's ReaLemon Marketing Plans (CX 1-4), and have been used in writing this decision.

9. Reconstituted lemon juice is manufactured by adding water, a preservative or preservatives, and lemon oil to pure lemon juice

concentrate which is purchased in bulk, often in tank cars, by large producers such as Borden. The ingredients are mixed according to a simple, well-known formula, using uncomplicated, relatively inexpensive equipment of the sort employed by any juice bottling operation (Hansfield, Tr. 132-135; Kendall, Tr. 535, 539; Wolcott, Tr. 635-636, 661; Delaney, Tr. 679-680; Peters, Tr. 1784-85). After manufacture, the product is packaged for consumer use in glass bottles ranging from 8 to 32 ounces in size (Hansfield, Tr. 2336; Kendall, Tr. 533-34; Delaney, Tr. 681, 693; Peters, Tr. 1785; Saving, Tr. 2510). In recent years a small volume has been marketed in plastic green or yellow lemon-shaped squeeze containers (Peters, Tr. 1786). [8]

A. Distinct and Unique Characteristics Differentiate Processed Lemon Juice from Fresh Lemons

10. Processed lemon juice has a variety of distinct and unique characteristics which differentiate it from fresh lemons.

Convenience

11. Processed lemon juice is readily, in fact, instantly, available for use as an ingredient for cooking or as an additive, as in the case of iced tea, for example. Borden's ReaLemon lemon juice may be kept for long periods in the refrigerator, up to six months or even a year (Lemmerman, Tr. 980; Goldberg, Tr. 2630; Greenberg, Tr. 1202). An ounce of ReaLemon bottled lemon juice is about the equivalent of the juice of one fresh lemon (CX 3, p. 753[1]), meaning that a quart bottle is essentially the equivalent, ready to use, of close to 32 fresh lemons.

12. Fresh lemons, in contrast, must be squeezed for use requiring time and work, and necessitating cleanup afterward. Additionally, since fresh lemons are perishable, they must be used within a relatively short time after purchase or allowed to go bad, and, if to be available when needed, must be constantly replenished.

13. ReaLemon over the years has promoted the advantage of its bottled lemon juice from the standpoint of convenience. As early as 1953, long prior to its acquisition by respondent Borden, ReaLemon emphasized in its advertising the convenience of lemon juice in a bottle over the trouble to the user of squeezing fresh lemons to obtain lemon juice (RX 192-194). This theme has been continued during intervening years to the present time. [9]

14. A few examples will convey the emphasis which ReaLemon

[1] Borden document numbers stamped on documents when turned over to the Commission's staff have generally been used in this decision to refer to pages within multi-paged exhibits.

gave in its promotional efforts to the convenience of bottled lemon juice over squeezing lemons for their juice. In an ad in *Readers Digest* in August 1956, ReaLemon showed a TV personality staging a contest over his "Breakfast Club" TV show demonstrating the time taken to squeeze enough lemons to provide the 16 ounces of lemon juice contained in that size of bottled lemon juice (RX 196, 215). Ads run in *Business Week, U.S. News and World Report,* and *Newsweek* during 1960 recounted the original founding of the ReaLemon company and the convenience of having ready-to-use lemon juice available in the kitchen without the time, fuss and bother of squeezing lemons (RX 198). Fifteen years later, in 1975, a program for national TV broadcasting featured the "convenience and availability" of ReaLemon over "produce," *i.e.*, fresh lemons (RX 546).

15. The convenience of processed lemon juice over fresh lemons has been generally recognized in the industry (Delaney, Tr. 689; Conrady, Tr. 3481; Crane, Tr. 3460; Fey, Tr. 3968; Foorman, Tr. 5046-48; Gordon, Tr. 3398; Rose, Tr. 4628; Silver, Tr. 3431; Toms, Tr. 3115; Wardell, Tr. 3304). The following are representative of the testimony of producers, brokers and distributors, and supermarkets. The Division Manager of the Product Sales Division of Sunkist Foods stated with respect to bottled or processed lemon juice that "basically you're working with a convenience item" (Delaney, Tr. 689). A Grand Rapids, Michigan, food broker testified that bottled lemon juice was differentiated from fresh lemons by "[c]onvenience primarily, because ReaLemon would stay in the refrigerator for months where fresh lemons would have to be used immediately on purchase or before they spoil in a short time" (Conrady, Tr. 3481). The Executive Vice President of a medium-size New York City area supermarket chain testified that "undoubtedly" [10] there was a "classification of consumers who will only buy the reconstituted product because of its convenience factor, no question about it" (Rose, Tr. 4628-29).

16. Purchasers and consumers believe bottled lemon juice to differ substantially from a convenience standpoint from fresh lemons. A survey by the Center For Advanced Marketing Practice, conducted in May 1972 for the ReaLemon Foods unit of respondent Borden, explored "consumers' attitudes toward usage of lemon juice—both packaged commercial and fresh" and reported the following, ReaLemon's bottled lemon juice being referred to as "commercial" (CX 236, p. 7682):

> The outstanding reason for use of the commercial lemon juice is convenience. First of all, it is always there. The housewife does not have to worry about having fresh

lemons on hand when she needs lemon juice, she does not have to make a special trip to the store when lemons are required, she does not have to keep lemons on hand that may spoil and get thrown away. The bottle stays in the refrigerator and is handy for any spontaneous use.

17. The corporate policies and marketing strategies of ReaLemon, as indicated, were based, among other factors, upon the advantage from a convenience standpoint of bottled lemon juice over fresh lemons. The ReaLemon Marketing Plan for 1973 stated (CX 3, p. 752):

Consumer Focus Group Sessions conducted in May 1972 in Chicago and New Jersey indicate that the user of bottled lemon juice is a convenience oriented consumer. [11] This is juxtapositioned against the fresh lemon user who is willing to sacrifice convenience for real/perceived flavor preference.

See also the ReaLemon Marketing Plan for 1974 (CX 4, p. 851).

Taste

18. There is a substantial, if not drastic, difference between the taste of reconstituted lemon juice and juice obtained from fresh lemons, differentiating these two products from each other. Respondent's 1972 Marketing Plan succinctly stated this fact (CX 2, p. 673):

Processed lemon juice is processed lemon juice and is not as good as the fresh equivalent in its taste qualities.

See also ReaLemon Marketing Plans for 1973 and 1974 (CX 3, p. 752; CX 4, p. 867). The latter noted that it was difficult to convert fresh lemon users to bottled lemon juice because they perceived "a great advantage in the taste of fresh lemons which far outweigh [sic] any convenience or economic factors."

19. The study prepared for respondent Borden by the Center For Advanced Marketing in 1972, already mentioned, evaluated a number of marketing factors bearing on bottled lemon juice. With respect to difference in taste between bottled lemon juice and juice squeezed from fresh lemons, the study informed Borden (CX 286, p. 7673):

The superior flavor of fresh lemon juice, the distasteful flavor of the commercial, is the chief reason for its use by the fresh users. The taste of the commercial is considered in no way comparable to the [12] fresh. The fresh is thought to be sweet and true tasting; the commercial is described as being different, imitation, funny tasting.

The foregoing conclusion was based on group interviews with a number of women. The group interview technique was utilized "to elicit spontaneous reactions from the respondents" (CX 286, p. 7657),

and the following specific comments of women interviewed were reported to Borden's ReaLemon management (CX 286, pp. 7673-74):

It's like night and day. You just can't compare the flavor.

I really mean the taste is so very different from fresh lemon. You just can't get the same taste synthetically that you do with something fresh. They are processing it. They've done something to it. It's not the same thing as the fresh.

It's nothing like a real lemon. It's like all the imitation products. It has a funny taste.

If I put the bottled lemon in tea I can't get the right flavor I want. If I use fresh lemon it's right any time.

When we make lemonade with the fresh, the lemons have a sweetness to it and we hardly have to use any sugar.

When it's fresh the flavor is stronger and truer and when it's canned or bottled the flavor is not the same.

It doesn't taste as good as fresh lemons. It really doesn't. It has a strong acidy taste. [13]

The fresh lemon is not as bitter. The bottled is stronger, more tart.

I think the concentrated is a little strong. It's a little different taste. Fresh lemon is the real lemon. I don't know what they put in the bottles but it makes it a little different.

I can take a slice of fresh lemon and eat it but I can't drink lemon juice from a bottle of reconstituted. It's much too tart and there's a bitterness to it. A fresh lemon has the tartness but not the same *strong* tartness.

It's bitter whereas a lemon is sour.

I made lemonade with the bottled stuff and the children wouldn't drink it. It was too strong.

Fresh lemons make a better lemonade but of course it's not as convenient. It's fresher tasting, not quite as tart.

It has a canny taste, a tin taste. It leaves an aftertaste in your mouth.

Most bottled things have chemicals added to it [sic] and you pick that up, the chemical taste.

The industry recognized the substantial difference in palatability of bottled lemon juice and lemon juice squeezed from fresh lemons (see Imming, Tr. 4603; Fey, Tr. 3969; Crane, Tr. 3466; Foorman, Tr. 5047; Robison, Tr. 5029; Heller, Tr. 5017). [14]

Shelf-life and Spoilage

20. As already stated, bottled lemon juice and fresh lemons are

very different products from the standpoint of freedom from spoilage. Fresh lemons are perishable commodities, and spoil within a relatively short time depending upon conditions (Heller, Tr. 5018; Goldberg, Tr. 2630; H. Greenberg, Tr. 1203; Lemmerman, Tr. 980; Rose, Tr. 4629; RX 314).

21. In contrast, bottled lemon juice may be kept for a year or more without spoiling (Peters, Tr. 1790).

Lack of Utility for Certain Uses

22. Processed lemon juice cannot be used for many of the purposes for which the public uses fresh lemons. When a restaurant or housewife wishes to garnish a dish with a slice of lemon, to present a beverage or iced tea with a lemon wedge, or to decorate a drink with a twist of lemon peel, obviously fresh lemons must be used (see Robison, Tr. 5022, 5026-27; Toms, Tr. 3112-13; Swartzberg, Tr. 2997; Edelman, Tr. 3230; Thomas, Tr. 3271; Lundell, Tr. 3360-61; Fey, Tr. 3959; Silver, Tr. 3431; Conrady, Tr. 3480; Bentley, Tr. 3288; Rose, Tr. 4628; CX 286, p. 7669).

23. In the restaurant industry, fresh lemons are commonly used in serving meals and beverages because of the visual appeal to the patron, which processed lemon juice cannot supply (Robison, Tr. 5032; Lundell, Tr. 3334-35; Bentley, Tr. 3289; Edelman, Tr. 3236; Stipulation, Tr. 6200; Massy, Tr. 5254). Similarly, householders, or some of them, use fresh lemons on occasions where appearance is important. The survey conducted for respondent by the Center For Advanced Marketing Practice found this to be true, reporting to respondent (CX 286, p. 7679): [15]

Commercial lemon juice is generally not considered appropriate for company. Even those who might use the bottled for their own tea, feel that fresh lemon should be used for entertaining because it looks nicer.

Presence of Additives in Bottled Lemon Juice

24. Bottled lemon juice contains additives which prevent spoilage and impart to the product the long shelf-life of a year or more mentioned earlier. The preservatives used have at times been 3/100ths of 1% sodium benzoate and 1/40th of 1% sodium bisulphite (RX 238-239). At other times, 1/30th of 1% sodium bisulphite (RX 248) and 1/50th of 1% sulphur dioxide have been used (RX 251). The presence of these additives, particularly sulphur dioxide, substantially differentiates bottled lemon juice from the juice from fresh lemons. Borden's ReaLemon precident wrote in the 1972 Marketing Plan (CX 2, p. 674):

The biggest potential problem facing REALEMON, aside from competition, is the use of Sulphur Dioxide as a preservative, as mentioned earlier. While the level used in the juice could not be considered in itself harmful, there has been considerable adverse publicity given to Sulphur Dioxide in the past couple of years, as people's awareness of air pollution has grown. Should they identify our preservative as being one and the same with the gas present in the air, we could have problems. Sulphur Dioxide does have, if nothing else, a very obnoxious odor, and yet at the same time, based on our own [16] experience as well as a two-year study by the Syracuse Research Centre, is the only preservative that works effectively on lemon juice. If we were unable to continue using it, we would not have a product that could be considered satisfactory to the consumer.

B. Substantial Retail Price Differences Prevail Between Processed Lemon Juice and Fresh Lemons

25. Very substantial price differences prevail between processed bottled lemon juice and lemon juice obtained from fresh lemons. The ReaLemon Marketing Plan for 1973 stated that juice from fresh lemons cost between three (3) and five (5) times as much as ReaLemon bottled lemon juice (CX 3, p. 753). Since respondent's ReaLemon lemon juice commands a premium price, as discussed later in this decision, the cost to the public of juice from fresh lemons was relatively even greater in the case of other brands of bottled lemon juice. For example, the 1973 Marketing Plan of respondent reported that the most recent Nielsen survey found a 17¢ price differential between ReaLemon and another brand of processed lemon juice (32 oz. size). Based on this figure, fresh lemon juice cost four (4) to seven (7) times more per ounce than non-premium bottled lemon juice (CX 3, p. 753). Respondent's labels state that an ounce of ReaLemon lemon juice is the equivalent of one fresh lemon (RX 238-266), and ReaLemon's chief executive testified to this effect (Peters, Tr. 4570).

26. In 1975, as an adjunct to nationwide TV advertising, respondent distributed brochures to the retail food industry which stated (RX 546, p. 6):

In a recent National survey [Nielsen], Dec. 11, 1974 to Jan. 3, 1975, the [17] price of fresh lemons averaged out at 12.3¢ each. (One lemon has about one ounce of juice depending upon the size—storage time—type—season, etc.)

The average price per ounce for REALEMON came to 2.8¢ per ounce.

12.3¢ for fresh lemons
2.8¢ for REALEMON

and the juice is extracted for her. . .it's available when she needs it. . .in volume. . .for her cooking-baking, tea, fish, salads, and many household uses. . . .

Based on the foregoing, the cost of fresh lemon juice was about four

(4) times the cost of respondent's ReaLemon, and correspondingly more than the cost of competing brands of bottled lemon juice.

27. Promotional literature used by respondent Borden stated in the late 1960's that "the lemons you'd squeeze to fill a quart bottle of ReaLemon would cost about 5 times as much" (RX 375; Lundell, Tr. 3157). Again, the lower price of other bottled lemon juices would have produced a correspondingly more expensive figure for fresh lemon juice.

28. Fresh lemons fluctuate in price on a weekly, or even, at times, a daily basis. The Executive Vice President of a supermarket chain in the New York City area testified that the price of fresh lemons fluctuated, as follows (Rose, Tr. 4623-24):

> . . . probably, on a week-to-week basis. A lot depends on not only the supply available from the field but the supply in transit to any given area at [18] any given time, or the cold storage holdings that might be involved in any given area or any given time.
>
> As a witness previously pointed out, the supermarket is nothing more than a transitory place. It is a place where products are stored for resale, and the hope is that it is a very immediate resale especially on the perishable products so that we would hope to turn lemons over twice a week, I would guess, so you would hope never to have lemons on hand for more than three or four days at any given time.
>
> If there is a large glut on the market of lemons, in a market, if there is a large supply of lemons in the market at any given time, the price is going to go very, very low. If lemons, for some reason, as a produce buyer told me, if a train company can't get through to New York, the price of lemons would go sky high in one day. It is very difficult to say.

In contrast, the price of bottled lemon juice changes at infrequent intervals, there being, for example, only one or two price increases on ReaLemon between 1970 and 1974 (CX 37-54).

29. Notwithstanding the large price differential between fresh lemons and processed lemon juice, the two products continued side-by-side in the marketplace, and $200,000,000 or more worth of fresh lemons continued to be sold annually, as stated earlier, many times the volume of processed lemon juice (Fey, Tr. 3970). Fresh lemons, in short, have not been driven from the marketplace. This circumstance alone is [19] strong evidence that fresh lemons and processed lemon juice are not in the same relevant market. As Dr. Mann testified (Tr. 6130, 6186-87):

> It seems to me that any product that sells at a quarter of the price of the other, and yet, doesn't sweep it out of the marketplace and, in terms of purchasing, shifting to other purchasers, it is so difficult for me to believe that the two products are viewed as very close substitutes even when I look at it in that kind of common-sense way.

. . . . . .

Q. Does the erosion of the market which was said to exist for ReaLemon after the entry of a low priced seller demonstrate to you that no other product competes with bottled lemon juice but another bottled juice?

A. Well, it is very supportive because another bottle of lemon juice comes in and has an impact on the market which leads to response on the part of ReaLemon, and it affects the market shares and it affects price behavior, but in the case of lemons versus reconstituted lemon juice, you have a price differential, a substantial price differential, reconstituted lemon juice being in the neighborhood of one quarter of the equivalent juice content of lemons and yet, lemons aren't driven out of the marketplace.

There seems to be no concern on the part of the marketers of lemons that the [20] price differential is unsustainable, without worry, that they are going to find themselves with nobody to sell to.

Q. Could a price differential that large be explained by quality and taste perception differences by consumers?

A. I suppose it could, but it would suggest to me that taste and quality differences were so extensive that they are really separate commodities.

C. Processed Lemon Juice Producers Priced Their Product in Competition with Competing Brands of Processed Lemon Juice—Not Fresh Lemons

ReaLemon

30. In pricing its processed lemon juice respondent Borden focused its attention on the prices of other brands of processed lemon juice, writing in its 1971 Marketing Plan that because of the inroads of competition "starting in 1970" price increases appeared to be "out of the question" (CX 1, p. 645). The plan went on to state that the spread between the price of respondent's ReaLemon processed lemon juice and competitive brands, 15¢ to 20¢ per unit, precluded any possibility of price increases to offset higher costs (CX 1, p. 649). The 1972 Marketing Plan observed that ReaLemon commanded a premium over "competitive offerings" as high as "25 to 30 cents per unit" (CX 2, p. 665) but noted that the most serious threat was the "low priced competition" (CX 2, p. 671). The 1973 Marketing Plan referred to the same problem stating that "new distribution" had been secured by "competitive brands" at the retail level, that "price sensitivity" had been exhibited at the consumer level, and that this "may be the [21] single most important area of the 1973 ReaLemon Plan" (CX 3, p. 781). The 1974 Marketing Plan noted that the "stability of the ReaLemon franchise" was significantly endangered by Golden Crown, "a price oriented competitive brand" (CX 4, p. 853). The plan reviewed the price spread between ReaLemon and Golden Crown processed lemon juice throughout the United States (CX 4, p. 873), and stated that price increases were planned to compensate for cost increases, but only outside "the highly competitive Golden Crown markets concentrated in Region 1 and part of Region 2" (CX 4, p. 873).

31. Respondent Borden's ReaLemon Foods did not gear its promotions to compete with fresh lemons, but to compete with other

processed lemon juice brands. The 1971 Plan, after listing dollar amounts for the years 1967 through 1970 for advertising and promotions, the latter increasing relative to the former, stated (CX 1, p. 646):

> The figures reflecting a considerable change in the ratio of advertising to promotion are in direct relation *to the advent of competition starting in 1967.* [Emphasis added]

By "competition" in the foregoing quotation Borden manifestly referred to other processed lemon juices inasmuch as fresh lemons have always been marketed. The 1972 Marketing Plan stated (CX 2, p. 700):

> REALEMON'S trade promotions can be considered most effective, as they generate considerable volume at the time they are being presented. In addition, this now has become an important tool in dulling the efforts of competition who are priced from 20 to 30 cents per bottle less than REALEMON, at those times when REALEMON is not being promoted.

[22] The 1973 Marketing Plan noted three major opportunities for improving performance in 1973, among them the following (CX 3, p. 817):

> The use of market-by-market deal levels with higher levels in competitive markets than now.

The "basic plan" envisaged different promotional payments in "highly competitive," "moderately competitive" and "low competitive" markets (CX 3, p. 828), indicating that other processed lemon juice brands were the competitive concern of Borden's ReaLemon management, not fresh lemons. See also, in this connection, CX 4, p. 858. That promotional payments were geared to compete with other brands of processed lemon juice rather than fresh lemons was confirmed by industry members. An Iowa food broker testified (Wardell, Tr. 3313):

> Q. Did ReaLemon ever offer promotions in regard to reduced prices on fresh lemons?
>
> A. In regard to reduced prices on fresh lemons?
>
> Q. If there was a special being offered for the sale of fresh lemons, Mr. Wardell, did the ReaLemon Company respond to that with one of their own promotions?
>
> A. No, sir.

The Grocery Buyer for a large Texas supermarket chain testified (Thomas, Tr. 3274): [23]

> Q. From your knowledge, Mr. Thomas, did the ReaLemon Company ever alter their promotions or offer new promotions due to the price changes of fresh lemons?
>
> A. No, I can't honestly say that they ever initiated changes because of the prices of fresh lemons.

To the same effect see Sherry, Grocery Buyer for a Midwest chain of supermarkets, Tr. 3416; Conrady, a Grand Rapids food broker, Tr. 3486–87.

32. The lack of sensitivity between fresh lemon prices and sales of processed lemon juice is indicated by the following testimony of the ReaLemon Foods' president (Peters, Tr. 4557):

Q. If fresh lemon prices are up this year as you indicated, have you noticed what kind of trend, if any, there has been in the sale of reconstituted lemon juice?

A. They remain flat. I'm at a loss to understand why, but we could either assume that advertising is ineffective or competition is really chewing us up.

Q. How about reconstituted lemon juice sales as a whole, not just ReaLemon?

A. They also have been pretty flat.

Other Processed Lemon Juice Marketers

33. Other processed lemon juice marketers priced their brands in competition with other processed lemon juice brands, particularly ReaLemon, [24] not fresh lemons (Kendall, Tr. 546-47; Westcott, Tr. 615-16; Wolcott, Tr. 649; Delaney, Tr. 686-89; Hansfield, Tr. 158-59, 161, 2344). Fluctuations in the retail price of fresh lemons had little or no effect upon the price of bottled or processed lemon juice. The manager of the Product Sales Division of Sunkist Foods testified (Tr. 689):

Q. Mr. Delaney, is there considerable price interaction between fresh lemons in the supermarket and reconstituted lemon juice?

A. In my opinion, no.

The president of another regional producer of processed lemon juice testified (Kendall, Tr. 546):

Q. Is there a close correlation between retail fresh lemon prices and retail processed lemon juice prices?

A. Do you mean, do they move up and down together or apart, this sort of thing? No. [Processed] Lemon juice prices are primarily, as I said earlier, predicated on cost and promotions, et cetera.

The president of Golden Crown processed lemon juice testified (Tr. 157):

Q. Mr. Hansfield, the day to day selling of Golden Crown Reconstituted Lemon Juice, with whom are you in competition?

A. The primary competitor in the reconstituted lemon juice is Real Lemon. I mean, they are the market. [25]

Q. In day to day sales procedures, are you in competition with fresh lemons?

A. No. We give no credence to fresh lemons at all.

The Sales Manager of a regional brand of bottled lemon juice testified (Wolcott, Tr. 616):

If fresh lemons went down considerably we would not adjust the price of lemon juice to meet that competitive situation. No, we wouldn't.

D. Retail Food Store Buyers Placed Orders for Processed Lemon Juice Without Regard for the Prevailing Price of Fresh Lemons and Vice Versa

34. Retail grocery and supermarket buyers did not consider the price of fresh lemons in making decisions on the purchase of processed or bottled lemon juice for resale. The grocery buyer for a Wisconsin chain of 80 retail food stores testified (Ellenson, Tr. 1963):

Q. Mr. Ellenson, in making buying decisions concerning ReaLemon lemon juice, do you consult the price and quantity information concerning fresh lemons at Godfrey stores?

A. No, sir.

Q. Why not?

A. It's two different worlds you're talking about, a concentrate against the pure natural product. [26]

The head buyer for one of the nation's largest supermarket chains, Acme Markets, Inc., testified (Moreland, Tr. 1024-25):

Q. While you were in the position of head buyer, did you discuss on a regular or on any kind of a basis with the produce buying department purchases of lemons or the price of lemons in making your decisions concerning ReaLemon lemon juice purchases?

A. No.

The head of the Grocery Division of another large supermarket chain, Penn Fruit, testified (Greenberg, Tr. 1190):

Q. Do you consider the price or the instore movement of fresh lemons when you purchase reconstituted lemon juice?

A. No. We have no conversations with the Produce Department. They do their own merchandising.

The Grocery Buyer Merchandiser for still another supermarket chain, Food Fair Stores, with supermarkets throughout the East Coast, testified to the same effect (Friedland, Tr. 1494):

Q. Do you ever consider the price or instore movement of fresh lemons when you purchase reconstituted lemon juice?

A. No.

Q. Do you feel these 2 products compete with each other? [27]

A. No, I don't.

The head buyer for a Pennsylvania Grocery Cooperative testified similarly (Leahy, Tr. 850):

Q. In determining the quantity of lemon juice that you purchase, do you, in any way, consult the price of fresh lemons in your member stores or the quantity of lemons in your stores?

A. No. When you come right down to it, they are two different products.

The Director of Grocery Purchasing for Giant Food, Incorporated, a large chain of supermarkets in the Baltimore-Washington-Richmond area, did not believe there was any price sensitivity from the consumer's standpoint between fresh lemons and bottled lemon juice, and did not think the price of fresh lemons affected the price of bottled lemon juice (Manos, Tr. 1521-22). This supermarket official stated (Tr. 1522):

If lemons are priced high, I don't think that a customer who is normally buying lemon juice, buying lemons, would rush over to buy lemon juice, necessarily, nor do I believe if lemons were being given away at a low price, would they stop buying [bottled] lemon juice.

See also to the same effect Gerace, head merchandiser for the leading supermarket chain, Tops Markets, in the Buffalo, New York, area, Tr. 2032; Goldberg, Director of Grocery Purchasing for a 187 member retailer-owned cooperative, Tr. 2628-29; Lemmerman, Vice-President in charge of grocery purchasing for a 104 store supermarket chain, Supermarkets General, [28] serving six states in the Northeast, Tr. 973-75; Springer, a purchasing agent for a Buffalo, New York, grocery wholesaler, Tr. 1862; Bentley, a Houston, Texas, food broker, Tr. 3294; and Silver, a Pittsburgh, Pennsylvania, food broker, Tr. 3434.

35. Conversely, the retail food store produce buyer of the largest or second-largest supermarket chain in the United States did not give consideration to the current price of processed lemon juice on the shelves of the chain's stores when placing orders for fresh lemons. The National Director of Produce Merchandising for the A&P testified (Watson, Tr. 6203):

Q. In making your decision as to what demand or how many fresh lemons to buy, did you consult the grocery buyer, check his supply or his price of [bottled] lemon juice?

A. No.

E. In Their Business Operations Respondent Borden's ReaLemon Management, Sales Personnel and Brokers Considered Pro-

cessed Lemon Juices and Brands Thereof To Be the Competitive Product Market

Marketing Plans

Respondent Borden's ReaLemon Foods prepared annual "Marketing Plans," referenced and quoted from earlier herein, in the fall of each year to chart business courses for the ensuing year. These are reliable business records, written by management. After revisions and redrafting, and discussion with Borden headquarters' executives, they were issued [29] by the ReaLemon Foods president for planned ReaLemon marketing the following year (Peters, Tr. 1754-55). Marketing Plans for 1971, 1972, 1973 and 1974 are in the record as exhibits (CX 1-4).

36. Although the advertising efforts of ReaLemon over the years have been geared to persuading the consuming public that the unique characteristics of bottled lemon juice, already discussed, for example, convenience, economy, relative non-perishability, etc., justified its use instead of fresh lemons, Borden management looked upon other processed lemon juice brands as constituting the competitive product market, not fresh lemons. This is revealed clearly in the Borden ReaLemon Marketing Plans for the years 1971 through 1974 (CX 1-4).

37. In 1971, viewing the competitive situation, Borden's ReaLemon management noted that its market share of processed lemon juice nationally was 92 percent at the beginning of 1970, but had slipped to 88.2 percent by August of that year. Although concluding that this loss was not great, the Marketing Plan pinpointed certain key markets as "danger spots." Milwaukee, St. Louis, Buffalo, Chicago, Cincinnati, Dayton and Columbus were identified as "now" having "Golden Crown Brand Lemon Juice for competition." Philadelphia was described as "under the siege" of competition from Seneca, another regional bottled lemon juice producer. Looking at the situation generally, the Marketing Plan observed (CX 1, p. 640):

> There are presently 10-12 competitors vieing for the bottled lemon juice business. Of these, three are presently causing the most difficulty, Golden Crown, Seneca, and Tropic Fresh.

The latter was a Florida producer which had "attained modest success in the Southeast." The Marketing Plan went on to note (CX 1, p. 642): [30]

> ReaLemon's other competition, while many in number, has not been of major proportions although it does include big names such as Sunkist and Vitapakt.

Both of the latter are brands of bottled lemon juice sold in California and the Southwest. In calculating its "market" share, Borden used the bottled or processed lemon juice industry, not that industry's sales *plus* fresh lemon sales.

38. The 1971 Marketing Plan states that in the past ReaLemon bottled lemon juice had been the "total market," that media and promotional expenditures had been highly successful in attracting new users and increasing uses with present buyers, and that the long range objective was to expand the size of the "total market," as follows (CX 1, p. 649):

> . . . ReaLemon has now become a protective umbrella over all lemon juice activity. The long range objective therefore, is to expand the size of this umbrella and thus the total market.

The "total market" in the ReaLemon view was thus processed lemon juice.

39. The short range objective given in the 1971 Marketing Plan was to prevent the price spread between ReaLemon bottled lemon prices and those of competitors "from increasing," in order to preserve respondent's "market share close to its present level" (CX 1, p. 649):

> Market share is the key, since industry or total market growth will be reflected more toward ReaLemon than its competitors by virtue of ReaLemon's present 90% market share. [31]

40. Turning to sales and profits, the 1971 Marketing Plan viewed other processed lemon juice marketers as ReaLemon's competition, rather than fresh lemons. Borden's 1971 Plan stated (CX 1, p. 645):

> Prior to the time of serious, effective competition, ReaLemon had been able to raise prices in direct proportion to costs and its desire to increase profits.

Further:

> Starting in 1970, when competition began to make serious inroads into ReaLemon's market share as a direct result of attacking in the most vulnerable area, price, further price increases appear to be out of the question. The whole issue is further complicated by the current problem of consumerism. With the cost of living going up as it has, many advertised brand names are being passed up in favor of cheaper, unknown offerings. Retailers are taking on items competitive to ReaLemon, and now the consumer, much more aware of costs/values, may be hesitant about spending 15-20¢ more per unit.

The Marketing Plan stated that in contrast to prior years the spread between the price of ReaLemon bottled lemon juice, and the prices of

competing bottled lemon juices, precluded "any possibility of price increases to offset higher costs" (CX 1, p. 649).

41. Discussing promotional pricing activity the 1971 Marketing Plan stated that ReaLemon again would be specifically attacking the problem of the retail price spread between ReaLemon and competition, and [32] noted that in "general terms, competitive activity exists in the Eastern half of the United States" (CX 1, p. 656). Promotional pricing was planned to amount to as much as $1.20 per case, or 10¢ per bottle in the East but limited to "60 to 75 cents per case" in the West (CX 1, p. 657).

42. From the foregoing, it is evident that respondent Borden's ReaLemon management did not look upon the product market within which it operated as including fresh lemons, but only other bottled and processed lemon juice products. Because of the fact that fresh lemons are marketed nationally in a dollar volume far greater than processed lemon juice, it is obvious that, if fresh lemons were in truth a component of the product market along with processed lemon juice, respondent Borden would not have had the market power prior to 1970 "to raise prices in direct proportion to costs" and "its desire to increase profits" (CX 1, p. 645). It is additionally evident that if fresh lemons were a component of the product market within which Borden's ReaLemon brand of processed lemon juice competed, Borden management would not, and could not have written that "[i]n general terms, competitive activity exists in the Eastern half of the United States" (CX 1, p. 656). Further, Borden could not realistically have engaged in dual geographic levels of promotional pricing, using $1.20 per case in the East and a much smaller figure "60 to 75 cents per case" in the West (CX 1, p. 657).

43. Similarly, the 1972 Marketing Plan viewed Borden's product competition to be other processed lemon producers. Although Borden's ReaLemon president continued the historic approach of ReaLemon of looking upon fresh lemon users as a source to convert to the use of bottled lemon juice by stressing "ease, convenience and economy," other brands of processed lemon juice were regarded as the day-to-day [33] product competition (CX 2, pp. 682-684). As a prelude to evaluating competition faced by ReaLemon bottled lemon juice, ReaLemon Foods' president wrote with respect to the "market" in which ReaLemon operated (CX 2, p. 669):

> Historically, REALEMON has been the market in the sales of processed lemon juice. At the present time with a 90% market share, REALEMON can still be considered the market.

Identifying competition, Borden's ReaLemon president then stated along the lines of the 1971 Plan just quoted (CX 2, p. 671):

REALEMON presently has in excess of 10 competitors, three of whom have been causing real problems. These are Golden Crown, Seneca, and Tropic Fresh.

Further (CX 2, p. 674):

Our competition has restricted its efforts for the most part, to the 32 ounce or quart size, which has been our feature size in the major metropolitan areas of the Northeast and North Central. The gains they have made thus far have been largely at one another's expense, although they have captured a segment of our market as well. Should they expand their efforts into a full array of sizes, our problems could begin to multiply at a more rapid rate.

44. Promotional efforts to maintain ReaLemon as the "featured brand at the retail level" (CX 2, p. 679) were directed at competing processed lemon juice producers, not fresh lemons. When respondent Borden's 1972 ReaLemon Marketing Plan noted that since "competition" was priced "far under us," it obviously referred to other brands of bottled lemon [34] juice, as it did when it referred to ReaLemon's trade promotions as having "now become, in addition to their other features, a tool or lever against competition" (CX 2, p. 688). Likewise, when respondent's ReaLemon president stated in the 1972 Plan that a national advertising program was necessary to strengthen ReaLemon's position in those markets where "competition" had made "sizeable inroads," the reference was to competing processed lemon juice brands (CX 2, p. 688).

45. The "Basic Platform" of ReaLemon's promotional efforts announced in the 1972 Plan was to use three annual promotions "off-invoice" to cause supermarkets to feature ReaLemon, and to "narrow the gap between competitors prices and our own" (CX 2, p. 690). The 1972 Marketing Plan further stated (CX 2, p. 690):

The consumer faced with the dilemma of buying an unknown, untried brand, but nevertheless offered at prices far below that of REALEMON, must be persuaded and motivated to continue buying the No. 1 brand.

Again, the target of these references was not fresh lemons, but competing brands of processed lemon juice.

46. The 1973 ReaLemon Marketing Plan (CX 3), like the Plans for prior years, did not look upon the "market" as consisting of both processed lemon juice and fresh lemons, and respondent's management did not consider and calculate ReaLemon's market share as a percentage of such a market. Instead, the 1973 Plan, as prior Plans, viewed the product "market" to be processed lemon juice, and the competitive problem the maintenance of ReaLemon's [35] historic

dominance in that market with approximately 90 percent of sales. As before, although the objectives of respondent's advertising strategy included enlargement of the overall processed lemon juice market by conversion of fresh lemon users to the use of ReaLemon (CX 3, pp. 787–88), the purpose or aim of respondent's specific promotions was directed at competing processed lemon juice producers (see, for example, CX 3, p. 792).

47. The 1973 Marketing Plan stated (CX 3, p. 738):

> During 1972 the competitive environment in the lemon and lime juice category has been significantly altered versus previous years. A comparison of SAMI data between 1971 and 1972 indicates the emergence of Golden Crown as the dominant factor within this segment.

Looking at the "competitive position" of the ReaLemon brand of bottled lemon juice, the 1973 Plan referred to the distribution inroads made by Golden Crown (CX 3, p. 767), and then identified other processed lemon juice brands in various areas (CX 3, p. 768):

> *Other Competitive Brands*
>
> All other competitive products tend to have regional distribution with the major areas as follows:
>
> (1) SENECA - New York City, Philadelphia, Baltimore/Washington, Norfolk and Cleveland
>
> (2) SUNKIST - Los Angeles, San Francisco and Phoenix [36]
>
> (3) VITA PAKT - San Francisco, Los Angeles, Phoenix and Philadelphia
>
> (4) TROPIC FRESH - Miami, Tampa, Jacksonville and Atlanta.

The failure to identify fresh lemons, or marketers thereof, in the foregoing review is significant.

48. ReaLemon's 1973 objective was to regain one-half of the "share loss in 1972" (CX 3, pp. 750, 759). The market share of competitors was reviewed in the 1973 Plan as of the situation August 4, 1972. In this portion of the 1973 Plan the competition was listed as Golden Crown, Seneca, Sunkist, Vita Pakt, Treesweet, and "All Others" (CX 3, p. 759). The market, thus, was again viewed as being made up of processed lemon juice producers, not those producers *and* fresh lemons.

49. Under the heading "Competition," the 1973 Marketing Plan of ReaLemon analyzed the national market in terms of other processed lemon juice producers, and a number of metropolitan and regional markets in terms of the share obtained by another bottled lemon juice producer, Golden Crown (CX 3, pp. 759–61). The strategy

of the latter firm was considered, and under "Other Competitive Brands," it was stated "there is no significant activity. . ." (p. 764).

50. Considering "Distribution—Key Account and Retail," the 1973 Marketing Plan stated (CX 3, p. 767):

> The lemon juice market has three major characteristics:
>
> (A) ReaLemon is the only nationally distributed product. [37]
>
> (B) Competitive brands are offered nationally however in general, with the exception of Golden Crown, secure regional distribution.
>
> (C) Golden Crown is expanding nationally as a function of:
>
> (1) Success in 1972 in terms of absolute sales and sales per store handling.
> (2) Increased manufacturing capacity.

Fresh lemons were not mentioned. Obviously they are "nationally distributed." It is clear that in making plans for 1973 ReaLemon management again viewed processed lemon juice as the "market" and other producers of processed lemon juice as the "competition."

51. For 1973, ReaLemon's management determined to continue the use of "Trade Promotions" to combat competition, and these were directed at other bottled lemon juice brands. The 1973 Plan stated (CX 3, p. 781):

> Trade deal activities have become an increasingly important tool at both the retail and consumer level. At the retail level new distribution has been secured by competitive brands and at the consumer level there has been exhibited a high degree of price sensitivity. This may be the singly most important area of the 1973 ReaLemon Plan.

Trade strategy was to be concentrated "in heavily competitive markets with low or moderately competitive markets receiving less weight" (CX 3, [38] p. 787). The ReaLemon plan was to retrieve in 1973 half of the market share, from 91.8 percent to 88.0 percent, lost between 1970 and 1972 to competitive processed lemon juice producers. This gain was to be achieved against "all brands other than ReaLemon" (CX 3, pp. 759, 790–91).

52. As already noted in connection with ReaLemon promotional payments, the 1973 Marketing Plan recognized three categories of markets, "HIGHLY COMPETITIVE," "MODERATELY COMPETITIVE," and "LOW COMPETITIVE" (CX 3, pp. 838–39). These categories referred to processed lemon juice, and took no account of fresh lemon sales or prices (see Peters, Tr. 1812–13).

53. The 1974 Marketing Plan likewise viewed the product market as processed lemon juice and the competitive threats to emanate from other processed lemon juice brands, particularly Golden Crown

(CX 4). To a somewhat greater degree than the 1973 Plan, respondent's 1974 Marketing Plan focused on the inroads made by Golden Crown on the ReaLemon market share. Plans and programs were made to retrieve lost ground, and to prevent future growth of Golden Crown. Under "REALEMON PERFORMANCE/COMPETITIVE BRANDS," the 1974 Marketing Plan stated (CX 4, p. 853):

The stability of the ReaLemon franchise is significantly endangered by the presence of Golden Crown, a price oriented competitive brand. However, it must be noted that Golden Crown simply highlights the vulnerability of ReaLemon to this form of competition whether it be a branded item or private label.

By "ReaLemon franchise" was meant the historic dominance of the ReaLemon brand of bottled lemon juice, and the consumer's acceptance of that brand [39] as virtually synonymous with bottled lemon juice. Pricing was considered to be the "major Golden Crown competitive tool" (CX 4, p. 854). Retailer margins were noted as important since margins affected Golden Crown's ability to "secure distribution, shelf space, display and feature activity" (CX 4, p. 855).

54. ReaLemon's marketing activities in 1973 were dominated by the shift from selling through brokers to marketing by respondent's own sales force, and by the development of a creative strategy to strengthen the consumer "franchise" and expand the category, that is, sales of all processed lemon juices. A third objective determined upon was (CX 4, p. 856):

The attempt to forest all the growth (in established markets) and the expansion (in new markets) of Golden Crown through more aggressive trade oriented activities.

55. The objectives of Borden's ReaLemon management for 1974 included an increase in the ReaLemon "market share" in "4 key Districts," New York, Philadelphia, Chicago and Detroit, and an increase in those metropolitan areas of "total category growth" from an estimated "normal" 4 percent to 10 percent, and to 7 percent in the rest of the United States (CX 4, p. 864). As before, market share was calculated on the basis of processed lemon juice sales, not including fresh lemon sales.

56. According to respondent's 1974 Marketing Plan prices were to be increased in markets accounting for 50 percent of total volume, but not increased in the "highly competitive" Golden Crown markets concentrated in Region 1 and part of Region 2 (CX 4, p. 873). In making the foregoing determination [40] to raise prices on ReaLemon processed lemon juice only in markets other than the "highly competitive Golden Crown markets," Borden's 1974 Marketing Plan again gave no consideration whatever to fresh lemons or their prices

(CX 4, pp. 873-874). Importantly, inasmuch as fresh lemons are marketed nationally, the ability of respondent to raise prices in those geographic areas where half its volume was obtained, and not in other geographic areas accounting for the remaining half, would seem to be strong evidence that the product market in which Borden's ReaLemon processed lemon juice competed did not include fresh lemons.

Day-to-Day Competitive Activity

57. The record contains a substantial volume of internal ReaLemon correspondence, memoranda, and communications between respondent's executives, sales personnel, brokers and others handling ReaLemon processed lemon juice. In these documents, the competitive conditions in the marketplace were of principal concern, and the competitive activities of respondent's ReaLemon Foods in the marketing of processed lemon juice were detailed. There is no question from this material that the product market was looked upon to consist of other brands of processed lemon juice, not including fresh lemons. In over 200 pages of documentation (CX 81) showing the monitoring of competitive products, nothing but the activities of other brands and producers of processed lemon juice were given significant attention. Such documentation covered the metropolitan areas of New York, Philadelphia, Pittsburgh, Chicago, Tampa, Detroit, Miami, Los Angeles, San Francisco, Seattle, Phoenix, Minneapolis-St. Paul and Houston during the years 1971 through 1974 (August). Among these competitive reports are reports of ReaLemon regional sales managers to Borden's National Sales Manager at [41] ReaLemon headquarters, naming the competitive products encountered in their areas. The following were named, all of which are processed lemon juices:

Golden Crown	Sunkist
Seneca	Kimball
Reddi-Lemon	Tree Sweet
VitaPakt	E Z Juicer
Tropic Fresh	M C P
Eclipse	Iris

See CX 81, pp. 7425-7434. Private label brands were also mentioned.

58. The fact that Borden's ReaLemon management viewed other brands of processed lemon juice as the competitive products, and not fresh lemons, can further be seen in a letter of January 16, 1974, by

the ReaLemon National Sales Director to all ReaLemon district and regional sales managers, as follows (CX 81, Part II, p. 9090):

In order for us to better formulate ReaLemon promotions in 1974, it would be helpful if you could at your earliest convenience direct to my attention the type competitive lemon juice activity in your district, that is, Golden Crown, Vita Pakt, Sunkist, etc.

At the same time it would be helpful if you could include their list price to the trade, any deals, etc. In addition, we would also like their retail price and our retail price for the corresponding size.

If you will supply us with this information I am sure that we will be in a better position to assist you in furthering the sale of ReaLemon in your district.

[42] All of the foregoing brands mentioned are other processed lemon juices, including Sunkist. There was no request for competitive activity in the sale of fresh lemons.

59. In letters in November 1973 to headquarters officials of the Borden Foods Division of Borden, Inc., the ReaLemon National Sales Director analyzed the ReaLemon market position in the following major metropolitan areas (CX 81, pp. 7439-40, 7478-79):

Philadelphia	Buffalo
New York	Chicago
Cleveland	Detroit
Pittsburgh	Indianapolis
Boston	Milwaukee
Baltimore/Washington	Minneapolis/St. Paul
St. Louis	

These letters focused upon the competitive problem of Golden Crown bottled lemon juice. No mention whatever was made of competition from fresh lemons.

60. A former Regional Sales Manager for respondent's ReaLemon processed lemon juice for the Northeastern area of the United States received reports from brokers under his supervision concerning the competitive situation they faced, and forwarded competitive reports to his superior, ReaLemon's National Sales Director. These reports likewise concerned competing processed lemon juice products, not fresh lemons (Taft, Tr. 1278-83). This former Regional Sales Director testified, as follows (Tr. 1279, 1282):

Q. So that I understand, do you recall receiving any correspondence from your broker concerning fresh lemon activity?

A. None whatsoever. [43]

• • • • • • •

Q. Mr. Taft, why were competitive reports sent from brokers to you concerned exclusively with other lemon juice products when discussing ReaLemon juice competitive activities?

A. The reconstituted lemon juice part of the business of ReaLemon Foods was the major bellwether of it and the principal concern was competitive bottled lemon juice to the sizes, and lime juice too, to the sizes that ReaLemon made, packed in the bottles.

61. **Respondent's ReaLemon brokers concerned themselves only with the competitive activity of other brands of processed lemon juice, not fresh lemons. The president of a Philadelphia based food broker testified (Vinocur, Tr. 2089-2090):**

Q. Do you recall sending Mr. Taft [ReaLemon Regional Sales Manager] competitive reports concerning fresh produce such as lemons?

A. No, sir.

Q. Why were the reports concerning ReaLemon lemon juice written exclusively about other lemon juices?

A. I take it you mean reconstituted lemon juice.

Q. Yes, if that is what they were in regard to.

A. Yes. Well, we strictly were concerned only with other brands of reconstituted lemon juice.

Q. Why?

A. Well, questions were only asked about other brands by ReaLemon of reconstituted lemon juice. [44]

Q. Questions by Mr. Taft?

A. Questions by Mr. Taft about ReaLemon. There were no questions asked about other forms of lemon juice in reference to reconstituted, bottled lemon juice.

Q. Is it fair to say your impression was they weren't interested in these other products?

A. It is a different category. Sure it is a lemon juice, but different shoppers, different market in essence.

JUDGE HANSCOM: What is a different market?

THE WITNESS: When I — bottled, reconstituted lemon juice is one type of market where there are certain people who use reconstituted, bottled lemon juice, and then there are others who would want to use fresh lemon juice, whether for the peel or whatever purposes they want. They don't want to use a reconstituted lemon juice. We never felt that one was in competition with the other as far as marketing plans.

• • • • • • •

Q When you refer to fresh lemon juice, you are referring to the juice of fresh lemons?

A. Yes, sir.

To the same effect: Silver, a Pittsburgh broker, Tr. 3434; Gordon, a Minneapolis broker, Tr. 3392-93; Conrady, a Grand Rapids broker, Tr. 3488-89. [45]

62. The president of respondent Borden's ReaLemon Foods viewed the competitive marketplace in which he was responsible for marketing ReaLemon processed lemon juice to consist of other processed lemon juice brands. He testified (Peters, Tr. 1783):

. . . in my mind there is a very clear distinction between the competitive marketplace and the relevant marketplace which is under discussion here. In the competitive marketplace I am, a very immediate day-to-day basis, our concern is obviously with bottled reconstituted lemon juice, and we formulate policy in the office and write up annual marketing plans and the like.

F. Other Marketers of Processed Lemon Juice Viewed Their Competition To Be ReaLemon and Other Brands of Processed Lemon Juice

63. The president of "Tropic Fresh," a Florida based regional brand of processed lemon juice already mentioned, testified (Tr. 541):

Q. Mr. Kendall, who are your competitors in the sale of lemon juice?
A. Our competitors in the sale of lemon juice are ReaLemon and Golden Crown.

His Sales Manager testified to the same effect (Westcott, Tr. 597):

Basically we sell against other lemon juices. We actually compete against other juices and drink products constantly.

[46] The President and Chief Executive officer of "Seneca," a regional processed lemon juice brand, also mentioned earlier, based in the Northeast, testified that the competitors he was familiar with were ReaLemon and Golden Crown, in addition to his own brand (Wolcott, Tr. 647). The Division Manager, Product Sales Division, Sunkist Foods, testified (Tr. 682):

Q. Mr. Delaney, who are Sunkist reconstituted lemon juice's competitors?
A. In the markets in which we are distributing, ReaLemon and Vita-Pack. I am not sure in the Texas market.

As to whether Sunkist's brand of processed lemon juice competed with fresh lemons, this executive thought that those products were probably in two different markets (Tr. 684):

Q. Mr. Delaney, does Sunkist reconstituted lemon juice compete with fresh lemons at the retail level?

A. In my opinion, that's a difficult question to answer. From the standpoint that Sunkist does market fresh lemon [sic], they also market reconstituted bottled lemon juice. In my opinion, we're probably looking at two different markets eventually. If a product has the same usage, there will be some competition, yes.

Where process lemon juice producers saw competition between their products and fresh lemons, it is clear that this was in the broadest sense (see, *e.g.*, Kendall, Tr. 569; Westcott, Tr. 614-15; Wolcott, Tr. 662-63). [47]

G. Fresh Lemons Are Marketed Without Regard for the Availability of Processed Lemon Juice

64. The Lemon Administrative Committee, operating pursuant to the authority of the Agricultural Marketing Act of 1937 under the supervision of the U.S. Department of Agriculture, regulates the volume of shipments of fresh lemons from California and Arizona domestically, and to Canada and Alaska (Faulkner, Tr. 1687-1701). The Manager of the Lemon Administrative Committee testified that in determining shipments of fresh lemons to the market the Committee does not consider "the availability of reconstituted or other processed lemon juices," the availability of fresh lemons in the market being the key factor considered in releasing additional supplies (Faulkner, Tr. 1723).

H. Fresh Lemons And Processed Lemon Juice Brands Have Specialized Vendors, Wholly Different Production Facilities, and Are Bought for Resale by Different Supermarket Buyers and Sold to the Public by Different Supermarket Departments

65. This proceeding contains the testimony of officials of two producers of fresh lemons, Sunkist Foods and Ventura Coastal Corporation. The former is well known. Ventura Coastal is a subsidiary of the Seven-Up Company. The Division Manager of the Product Sales Division of Sunkist Foods testified that Sunkist was divided into a "fresh fruit marketing group and a products marketing group" (Delaney, Tr. 678). As noted, Sunkist produces and markets a processed lemon juice in competition with ReaLemon processed lemon juice, and also sells lemon concentrate to ReaLemon, Sunkist's largest customer for that substance (Tr. 679-682). Fresh lemons and Sunkist's processed lemon juice are sold through two completely distinct company organizations (Delaney, Tr. 687-88). [48]

Q Now, Mr. Delaney, can you tell us what kind of sales organization you have for your reconstituted lemon juice?

A Our reconstituted bottled lemon juice is sold through a broker network, and we have approximately 35 to 40 brokers across the United States. But as you can appreciate being in only the three markets we're in, Northern and Southern California and Texas, there is a limited broker involvement.

Q Mr. Delaney, are you familiar with the sales organization used to sell Sunkist fresh lemons?

A Well, we have approximately 40 district offices of Sunkist across the United States.

Q Would it be fair to characterize these [two] sales organizations as different — not the same as sales organizations?

A No. Our fresh sales organization is completely different from the products organization.

Similarly, the Ventura Coastal Corporation marketed its fresh lemons and frozen lemon juice through two completely different sales divisions (Higby, Tr. 738–39).

66. Fresh lemons are marketed through produce brokers, who sell fresh lemons through produce wholesalers (Higby, Tr. 744; Faulkner, Tr. 1700; Beavers, Tr. 1581; Watson, Tr. 6203; Lemmerman, Tr. 969–70; Imming, Tr. 4602). The produce brokerage business is one characterized by fluctuating prices and requires a special expertise (Beavers, Tr. 1582). [49] Processed lemon juices are sold through food brokers or company salesmen (Higby, Tr. 745; Kendall, Tr. 540; Hansfield, Tr. 130, 149).

67. Bottled lemon juice, such as ReaLemon, is sold to supermarket grocery buyers whereas fresh lemons are sold to supermarket produce buyers (Hansfield, Tr. 152–53; Delaney, Tr. 689; Ellenson, Tr. 1963; Friedland, Tr. 1494; H. Greenberg, Tr. 1190; Lemmerman, Tr. 974; Manos, Tr. 1521; Moreland, Tr. 1024; Vinocur, Tr. 2107; Wolcott, Tr. 648; Wrisley, Tr. 2188; Foorman, Tr. 5048; Thomas, Tr. 3263). Grocery buyers and brokers recognize distinct problems faced by produce buyers, such as spoilage, bulk transfer costs, supply fluctuations, and fluctuating prices (Thomas, Tr. 3262; Foorman, Tr. 5048; Wardell, Tr. 3315). Grocery buyers, generally, do not consider themselves competent to be produce buyers due to the expertise needed (Lemmerman, Tr. 981; Moreland, Tr. 1024; Toms, Tr. 3106; Thomas, Tr. 3262; Sherry, Tr. 3415–16; Rose, Tr. 4631). As a result of the purchase by different departments, fresh lemons are displayed and sold to the public in the fresh fruits and vegetable departments of supermarkets and retail food stores, whereas bottled lemon juice,

except in some instances of plastic squeeze containers shaped like fresh lemons, is carried on the shelves of the grocery department.

68. Production facilities for fresh lemons and processed lemon juice are, of course, wholly distinct. Fresh lemons are grown in warm climates such as California, Florida and Arizona, and are picked, processed by being washed, sorted, waxed, sized, etc., and are then marketed as fresh produce (Higby, Tr. 743-44; Delaney, Tr. 688). Processed lemon juice such as ReaLemon can be manufactured anywhere using lemon concentrate, water, a preservative, and mixing and bottling machinery (Wolcott, Tr. 635-36; Delaney, Tr. 679-80; Peters, Tr. 1785; Hansfield, Tr. 132-34; CX 2, p. 673). [50]

69. Based upon all of the foregoing, as indicated at the beginning of this section, the undersigned finds that processed lemon juice constitutes a valid relevant product market within which to consider respondent Borden's competitive conduct in the marketing and sale of its ReaLemon reconstituted lemon juice. Although in a broad sense fresh lemons and bottled reconstituted lemon juice may compete for many of the same end uses in the hands of the public, the two products are so drastically and substantially different from each other in a variety of crucial and important characteristics of economic and other significance that they constitute at the very least components of separate and distinct submarkets for antitrust and restraint of trade purposes, that is, for testing the allegations of the complaint in this proceeding.

Monopoly Power

A. Respondent Borden Possessed a Monopoly Share of the Processed Lemon Juice Market

70. Having determined that processed lemon juice constitutes, at the least, a valid submarket for the purposes of this proceeding, there is no question that respondent Borden's ReaLemon brand over the years has had, and now has, a monopoly share of that market. Market share data from several different sources are in the record and all are essentially consistent.

71. Respondent's ReaLemon Marketing Plans, already discussed in some detail, gave repeated consideration to its market share of processed lemon juice, both nationally and in important metropolitan areas, and to that of its processed lemon juice competitors. As described, the 1971 Marketing Plan referred to the 92 percent market share of ReaLemon (CX 1, p. 639). [51]

C. MARKET SHARE AND COMPETITIVE SITUATION

1. Bottled Lemon Juice is in virtual 100% distribution throughout the United States, with an estimated market share of 92% at the beginning of 1970, and 88.2% through August. (Source S.A.M.I.)

The "S.A.M.I." source referred to is "Selling Areas - Marketing, Inc.," which is a recognized and well established market research organization. Respondent's ReaLemon management subscribed to "S.A.M.I." reports beginning in 1971, and has relied on them in determining market shares for the purpose of charting business courses (CX 1-4; CX 81, pp. 7289, 7307-7308, 7314, 7316, 7482; CX 263; CX 323). "S.A.M.I." reports are in common use by businessmen in the grocery industry, are considered highly reliable, and were provided by respondent's ReaLemon management to its sales personnel for use in marketing ReaLemon processed lemon juice (Taft, Tr. 1317-1320; Manos, Tr. 1524; Lemmerman, Tr. 978-980; Laurent, Tr. 2212-2214; H. Greenberg, Tr. 1202; Friedland, Tr. 1500; Ellenson, Tr. 1965-66; Leahy, Tr. 842-43; Gerace, Tr. 2033; Delaney, Tr. 686; Kendall, Tr. 551; Hansfield, Tr. 153-56; Wolcott, Tr. 653; Renner, Tr. 2603-2604; Springer, Tr. 1862-63; Vinocur, Tr. 2141-42; Wrisley, Tr. 2175; Silver, Tr. 3435; Higby, Tr. 749; Bentley, Tr. 3290).

72. The 1971 Marketing Plan of ReaLemon further stated its "Long Range Objective," a portion of which has also already been quoted, showing its dominant position in the processed lemon juice industry (CX 1, p. 649): [52]

III. OBJECTIVES OF THE PLAN

A. LONG RANGE OBJECTIVE

1. Historically, ReaLemon has been THE total market for both bottled lemon and lime juices. Media and promotional expenditures directed toward attracting new users and increasing uses with present buyers have been highly successful and were directly related to ReaLemon's sales history. This same media and promotional effort presently blankets sales of all bottled lemon juice, including those of competition. In other words, ReaLemon has now become a protective umbrella over all lemon juice activity. The long range objective therefore, is to expand the size of this umbrella and thus the total market.

73. The 1972 Marketing Plan of ReaLemon, prepared and submitted by its president, quoted in part earlier, stated (CX 2, p. 661):

EXECUTIVE SUMMARY

• • • • • • •

A cautious optimism is also necessary in considering the competitive picture. In a completely unique situation, ReaLemon Lemon Juice presently commands a premium of as high as 25 to 30 cents per unit over competitive offerings. [53] No such differential on any other food product, frozen or non-frozen, exists anywhere in the industry. *Such differentials have definitely hurt our efforts in individual markets, although our overall market share is still in the 90% range.* In order to maintain this kind of market share, it will be necessary to expand our marketing effort in order to generate growth in total lemon juice sales. Given the dollars, our marketing know-how should enable us to meet this goal. (Emphasis added.)

Subsequently in the 1972 Plan ReaLemon's president stated (CX 2, pp. 669, 675, 677):

THE MARKET

• • • • • • •

(a) Market Description REALEMON'S sales of bottled and plastic lemon juice for 1970 amounted to approximately 18 1/2 million dollars. With a 90% share of market, the total, therefore, would be somewhat in excess of $20 million. REALEMON'S case volume in 1970 was slightly in excess of four million cases, packed in a combination of 12 and 24 pack units, or a grand total of approximately 77,000,000 units.

• • • • • • •

. . . As the SAMI Report indicates in Appendix #3 REALEMON on an overall basis, [54] still have [sic] an approximate 90% share of market, with the other competitors sharing the balance. No one of them stronger, perhaps, than a 3-4% share of the market.

• • • • • • •

Problems and Opportunities:

The problem in terms of severe retail differentials has already been described.

The opportunity for maintaining our position must be one of making the total market grow. *Thus far, we have been virtually the only brand advertised, and for the most part, the only brand promoted.* The level of both our advertising and promotion must be maintained and increased, so that we can make the total category larger. *With our market share of approximately 90%, growth in the total market automatically represents growth for REALEMON.* (Emphasis added.)

74. The 1973 ReaLemon Marketing Plan again reported market shares for ReaLemon and its major competitors (CX 3, p. 759):

Market Share and Trend

The following reviews SAMI dollar share data for the lemon and lime category. [55]

	Year Ending 12/25/70	*Year Ending 12/24/71*	*7 Months Ending 8/4/72*
REALEMON	91.8	91.4	88.0
GOLDEN CROWN	1.4	2.4	5.5
SENECA	2.0	1.5	1.1
SUNKIST	2.1	1.7	1.4
VITA PAKT	.4	.5	.4
TREESWEET	.5	.4	.4
ALL OTHERS	1.8	2.1	3.2
TOTAL	100.0	100.0	100.0

As previously noted while the overall market share of ReaLemon has had a relatively small decline, recent trends are more severe. In addition, only a market-by-market review can indicate the situation due to the limited distribution of Golden Crown, the major competitive brand.

75. Complaint counsel in this proceeding obtained data from firms marketing processed lemon juice (CX 239; Dr. Greenberg, Tr. 2794-2806, 2807-2837, 2844-49, 2850-53). This data shows the following market shares.

Market Shares of Leading Four Firms
Processed Lemon Juice Industry
1969-1974

Market Shares Measured in Gallons
(Percent of Market)

Firm	*1969*	*1970*	*1971*	*1972*	*1973*	*1974*
A	88.7	86.1	84.2	80.2	77.4	75.3
B			4.4	9.1	13.1	14.9
C	1.4					1.4
D	1.9	3.1	2.2	1.8		
F	2.8	2.5	2.1	1.8	1.6	
G		1.7			1.4	1.4

[56] Market Shares Measured in Dollars
(Percent of Market)

Firm	*1969*	*1970*	*1971*	*1972*	*1973*	*1974*
A	88.9	87.1	86.1	82.9	79.9	77.8
B			2.7	5.9	9.2	10.6
C	1.2					1.9
D		1.5				
E				2.2	3.2	2.9
F	3.0	2.7	2.2	1.7	1.5	
G	1.2	1.5	1.7			

Source: Compiled from data submitted by firms (CX 239).
The firm "A" is ReaLemon and firm "B" is Golden Crown (Dr. Greenberg, Tr. 2806).

76. Using "S.A.M.I." reports, complaint counsel tabulated the ReaLemon market share of bottled lemon and lime juice category in 30 major metropolitan markets from January 22, 1971, through April 1974 and, in some instances, May 1974 (CX 258). For April or May 1974, this data shows the following market shares of ReaLemon in the cities listed:

	Equivalent[2] Units
Atlanta	78
Baltimore/Washington	76
Birmingham/Montgomery	80
Boston/Providence	70
Buffalo	65
Charlotte	80
Chicago	76
Cinn/Day/Columbus	91
[57] Cleveland	79
Dallas/Ft. Worth	80
Denver	67
Detroit	72
Houston	97
Indianapolis	89
Jacksonville/Tampa	70
Kansas City	97
Los Angeles/S.D.	54
Memphis/L.R.	96
Miami	86
Milwaukee	72
Minneapolis/St. Paul	99
New Orleans	87
New York	81
Philadelphia	73
Phoenix/Tucson	81
Pittsburgh	86
St. Louis	89
San Francisco	92
Seattle/Takoma	97
Syracuse	77

77. The 1974 ReaLemon Marketing Plan provided shares for 30 of

[2] SAMI reports adjusted cases of different size containers to equivalent gallon units (see CX 258 A and Tr 2316-17)

the nation's leading metropolitan areas for the 52 weeks ending August 31, 1973 (CX 4, p. 883):

SAMI UNIT SHARE - 52 WEEKS ENDING 8/31

REALEMON

MARKET	*TOTAL BOTTLED*
Atlanta	77.1
Balt/Wash.	80.1
Birm/Mont.	77.7
Boston/Prov.	69.2
Buffalo	68.5
Charlotte	28.7
[58] Chicago	73.4
Cincinnati	87.5
Cleveland	81.6
Dallas/Ft. Worth	71.9
Denver	55.4
Detroit	70.2
Houston	86.7
Indianapolis	87.5
Jacksonville/Tampa	69.1
Kansas City	83.9
L.A./San Diego	40.1
Memphis/Little Rock	90.3
Miami	70.1
Milwaukee	70.8
Minn/St. Paul	89.5
New Orleans	82.7
New York	78.0
Philadelphia	73.9
Phoenix/Tucson	71.2
Pittsburgh	81.6
San Francisco	77.1
Seattle/Tacoma	83.7
St. Louis	86.1
Syracuse	66.4

Although there are some differences between the foregoing figures and those contained in complaint counsel's tabulation and listed in the previous finding, overall the shares stated in both sources are quite consistent.

78. According to respondent's own Marketing Plan derived from "S.A.M.I." reports in August 1973, in 12 metropolitan areas, Baltimore/Washington, Cincinnati, Cleveland, Houston, Indianapolis, Kansas City, Memphis/Little Rock, Minneapolis/St. Paul, New Orleans, Pittsburgh, Seattle/Takoma and St. Louis, containing around 23,000,000 people, respondent ReaLemon's share of the processed lemon juice market was 80 percent or greater. In another

4, Atlanta, Birmingham, New York City and San Francisco, containing another 15,000,000 or more people, respondent's possessed a 75 percent market share, and in 7 more, Chicago, Dallas, Detroit, Miami, Milwaukee, Philadelphia and Phoenix, where another 22,000,000 people live, respondent's ReaLemon held over 70 percent of the market.

B. Industry Concentration Ratios

79. In view of the dominant market share of processed lemon juice commanded by respondent Borden's ReaLemon brand, it would be expected that industry [59] concentration ratios would be high. And they are. The four-firm concentration ratios in the processed lemon juice industry for the years 1969 through 1974 were (CX 239):

Year	
1969	94.3
1970	92.8
1971	92.7
1972	92.7
1973	93.8
1974	93.2

These are exceptionally high ratios (CX 295-299).

C. ReaLemon Is the Dominant Brand and Virtually the Generic Name for Bottled Lemon Juice and Commands a Premium Price

80. Respondent Borden acquired the ReaLemon-Puritan Company in 1962, and thus acquired the ReaLemon brand name and processed lemon juice business. Respondent paid $12,370,514 for the ReaLemon-Puritan Company although the adjusted net worth of ReaLemon-Puritan assets acquired was $2,767,619 (RX 363, p. 52; Dillon, Tr. 4849-4850). The difference in the two figures represents "good will" of which it may be concluded that the "ReaLemon" brand, and the sales and profits achieved by that brand name, were the key factors. The ReaLemon bottled lemon juice business was an outgrowth of a fresh lemon juice operation commenced in 1935 (Schwartzberg, Tr. 2971-75; RX 198, 216). The ReaLemon name was adopted in 1944 or 1945 and ReaLemon was the first bottled lemon juice on the U.S. market (Schwartzberg, Tr. 2975).

81. The complete dominance and acceptance by the public of the ReaLemon brand name are clear from the record. ReaLemon

processed lemon juice is the only [60] nationally distributed brand, all other brands being local or regional, with the possible recent exception of Golden Crown (CX 1, pp. 640-42; CX 3, pp. 767-68). As already described, the 1971 Marketing Plan described ReaLemon as "the total market" for bottled lemon juice stating that it had become the "protective umbrella" over all lemon juice activity (CX 1, p. 649). As also described, the president of ReaLemon Foods in the 1972 Marketing Plan characterized the ReaLemon brand as "one of the greatest brand names in the history of the supermarket" (CX 2, p. 670), and further noted that in a "completely unique situation" ReaLemon lemon juice commanded a premium of 25 to 30 cents per unit over competitive bottled lemon juices, and that no such differential on any other food product, frozen or non-frozen, existed anywhere in the industry (CX 2, p. 665).

82. The 1973 Marketing Plan reported that "on a national basis" ReaLemon lemon juice, 32 oz. size, enjoyed a 36.3 percent price premium over the leading competitive brand (CX 3, p. 740). No price increase was planned for 1973 due to the "large and important price differential between ReaLemon and competitive brands" (CX 3, p. 807). The 1974 Marketing Plan reported that in April/May and June/July of 1973, the consumer cost for a 32 oz. bottle of ReaLemon lemon juice was 62¢ whereas the cost for the leading competitive brand was 46¢ to 48¢, ReaLemon thus commanding a price premium of about 30 percent (CX 4, p. 855).

83. The price differentials obtained by ReaLemon lemon juice were not due to any inherent product superiority, but rather to the premium brand image of ReaLemon created by a number of factors including advertising and promotion over the years. The president of respondent Borden's ReaLemon Foods, as noted earlier, stated in the 1972 Marketing Plant (CX 2, p. 673): [61]

> From a technical standpoint, REALEMON has no apparent advantage over the juice of any of its competitors. Processed lemon juice is processed lemon juice, and is not as good as the fresh equivalent in its taste qualities.

The 1971 Marketing Plant described one of two short-range objectives (CX 1, p. 650):

> Although reconstituted lemon juice is virtually indistinguishable one brand from another, heavy emphasis on the ReaLemon Brand name through its media effort should create such memorability for the brand, that an almost imaginary superiority would exist in the mind of the consumer, a justification for paying the higher price we are asking.

The 1973 Marketing Plan stated, quoting from a management summary (CX 3, p. 756):

"ReaLemon is thought of as *the* commercial lemon juice. It is widely known and has an image of quality in its field (for fresh and commercial users alike)." (Emphasis in original.)

84. The Center For Advanced Marketing Practice reported to ReaLemon Foods in May 1972, after a study of consumer attitudes described earlier (CX 286, p. 7681):

BRANDS AND PATTERNS OF USAGE

Brands

"ReaLemon is really the only one" expresses the prevailing sentiment in these groups. While respondents [62] are aware of a few other brands (Seneca, Shop-Rite, Crown, National), ReaLemon is the one that stands out as *the* commercial lemon juice. These women feel it was the original commercial lemon juice and has been available for many years. Although no differences were mentioned between ReaLemon and the other products, both commercial and fresh users see ReaLemon as the brand that is proven and reliable and has captured their brand loyalty. (Emphasis in original.)

The report further noted that the impact of the ReaLemon name "is also evidenced by the frequency with which respondent refers to 'real' lemon juice when discussing the fresh product" (CX 286, p. 7681).

85. Witnesses from the industry testified that the ReaLemon brand was completely dominant, commanded premium prices, and was virtually the generic term for processed lemon juice. A former ReaLemon Regional Sales Manager stated (Taft, Tr. 1284):

Q Why was ReaLemon able to command a higher price than these competitors?

A ReaLemon was first in the business and over a long period of years they had established a very dominant consumer and trade-wise acceptance.

Q How would you evaluate ReaLemon's brand name as far as its impact on potential buyers?

A It is almost generic.

[63] The former head grocery buyer for a division of a large Eastern supermarket chain testified (Moreland, Tr. 1022):

Q Will you tell us why Acme has continued to stock ReaLemon during at least this 12 year period that you are familiar with?

A There is a customer demand for the item. ReaLemon is almost a generic term for lemon juice, like Coke or Morton's Salt.

A Pittsburgh food broker testified (Silver, Tr. 3436):

Q Comparative strength — do you have an opinion as to the comparative strength of ReaLemon in the sense of its strength with the consumer and recognizability?

A Well, I would say if you were thinking of peanuts you would think of Planters. If you think of refrigerator you think of a Frigidare. It is synonymous with the name.

Q If you think of lemon juice?

A I would think of ReaLemon.

The president of a Philadelphia brokerage firm testified (Vinocur, Tr. 2106):

Q. Mr. Vinocur, are you familiar with the term "premium brand"?

A. By that I take it you mean —

Q. I would like to know what you mean. [64]

A. By "premium brand" would be the brand that has the quality connotation or the advertising behind it or brand acceptance by the — Mrs. Consumer.

Q. Is ReaLemon a premium brand?

A. ReaLemon is a very sound, strong, premium brand.

If I may add, there is similarly — as ReaLemon is to the lemon juice market, Jello is to the gelatin market. I feel that the people have accepted ReaLemon as the standard of product of lemon juice.

The Grocery Buyer for the leading supermarket in the Buffalo area testified (Gerace, Tr. 1988):

. . . ReaLemon is — well, as I mentioned earlier, it is like Crisco. It is the name of the ReaLemon. When you say lemon juice in reconstituted form it is generally ReaLemon. It is the product that the customers have used for years, and they are very familiar with it. . . . So ReaLemon has over the years, over the years, has just developed their name. When people want a reconstituted lemon juice the demand has been for ReaLemon.

Another marketer of processed lemon juice testified (Wolcott, Tr. 647):

Q. Why, in your opinion, Mr. Wolcott, does ReaLemon command a premium price?

A. Because they have a consumer franchise that's similar to Welch's Grape Juice and Miracle Whip Salad [65] Dressing and many other brands that have been selected, and because of that consumer franchise the consumer perceives the product to be superior and will pay a premium price for it, or if the products are priced competitively or at the same price, they will tend to buy the brand.

The Grocery Buyer for a Wisconsin based wholesale-retail grocery chain testified (Ellenson, Tr. 1960-61):

Q. Mr. Ellenson, can you tell us why you think that ReaLemon commands a higher price both at your cost level and at the retail level?

A. Personally I think that the ReaLemon people, being in the Wisconsin market, for the length of time that they have built a brand image that they have, that when a consumer walks into a retail store to pick up a bottle of [reconstituted] lemon juice, she's got in her mind that it is ReaLemon, regardless of whose it is; and we found this true in many other categories that we carry.

The first in, that constantly promotes their own name themselves, seems to almost create a brand identity in the consumer's mind that she just can't get out of it.

See for similar testimony: Hogue, Tr. 420-22; Pripstein, Tr. 4681; Boden, Tr. 2662; Thomas, Tr. 3266-67; Westcott, Tr. 606-607;

Laurent, Tr. 2240; Kendall, Tr. 542; Immekus, Tr. 1627-28; Friedland, Tr. 1491-92; and Crane, Tr. 3462. [66]

86. Shelf space in retail food stores, particularly supermarkets, is often limited with many products competing for what is available (Hogue, Tr. 414). Processed lemon juice industry members testified that if a supermarket had only room for one brand of processed lemon juice on its shelves, that brand would be ReaLemon (Wrisley, Tr. 2178-79; Gordon, Tr. 3406; Pripstein, Tr. 4683; Sherry, Tr. 3412-13; Kendall, Tr. 549-50; Wolcott, Tr. 651; Leahy, Tr. 846-47; Renner, Tr. 2603; Immekus, Tr. 1629-30; Lemmerman, Tr. 971; Rose, Tr. 4620; Foorman, Tr. 5042-44; Thomas, Tr. 3265; Moreland, Tr. 1124; Vinocur, 2102-2103; Westcott, Tr. 610; Beavers, Tr. 1596-97; Goldberg, Tr. 2625-26; H. Greenberg, Tr. 1184). The National Sales Manager of a competing processed lemon juice firm testified (Hogue, Tr. 414):

> . . . We put ourselves in the position of the buyer of that product in the grocery store. He already handles ReaLemon and then we come to him and say, "We have a fine product we want to sell called Vita-Pakt," and he says, "Mr. Hogue, I have plenty of lemon juice. It's a good juice, it sells well, I don't need yours, sir."

87. ReaLemon has advertised its brand name extensively over the years. Until 1972, when Golden Crown "commenced advertising activities on a minor scale in selected markets," ReaLemon was the only significant advertiser in the processed lemon juice industry (CX 3, p. 772). The president of ReaLemon Foods wrote in the 1972 Marketing Plan that ReaLemon in 1970 maintained its position as the "leading bottled lemon juice advertiser," and that ReaLemon's advertising effort including a projected 1971 advertising expenditure of $629,100 contributed to the "continued domination of bottled lemon juice share of market by REALEMON" (CX 2, p. 681). [67]

88. The dominance of the ReaLemon brand and the acceptance of that brand by the public, under the circumstances shown by the record of this proceeding, constitutes a substantial barrier to the entry of new bottled lemon juice marketers.

D. Respondent Borden's ReaLemon Foods Realized a Rate of Return on Assets Far Greater Than That of Other Food and Industry Groups Indicating Monopoly Power

89. Complaint counsel contend that ReaLemon's rate of return on assets for the years 1968 through 1973 averaged nearly four and one-half times the rate of return realized by other firms in the "Food and Kindred Products" industry group, and four and one-half times greater than the rate of return for "All Manufacturing Corpora-

tions" as set out in FTC/SEC Quarterly Financial Reports for the foregoing years (CX 252, 294, 300-301). The ReaLemon rate of return was 25.7 percent on assets in contrast to the 5.82 percent realized by the "Food and Kindred Products Industry" and the 5.97 percent realized by "All Manufacturing Corporations" (CX 294, 300-301). Respondent Borden contends this conclusion is incorrect on the ground that $9,602,895 paid by Borden for ReaLemon over and above that firm's adjusted net worth when acquired in 1962 has not been included in making the calculation. Respondent Borden, as stated earlier, purchased the ReaLemon-Puritan Company in 1962 for $12,370,514 although its adjusted net worth was only $2,767,619 (RX 363, p. 52; Dillon, Tr. 4849). The difference between these figures is the foregoing $9,602,895, which reflected the value of the ReaLemon brand name, the dominant market position thereof and the profitability of the firm. Dr. Michael Mann, an expert economist identified at the beginning of this decision, testified that the $9,602,895 premium paid by Borden for ReaLemon (Tr. 6118): [68]

> . . . reflects the fact that Borden paid a purchase price for the ReaLemon hard assets which discounted a rather handsome stream of future earnings.

And further (Tr. 6121):

> . . . they paid a purchase price substantially in excess of the book value of the hard assets which reflected their judgment that those hard assets were going to bring a stream of income which was substantially in excess of what would have been the case buying just any average food and kindred product firm.

See also Tr. 6161-64 and Tr. 6182. In the opinion of the law judge this is an accurate appraisal. It is plain that had Borden not acquired ReaLemon there would have been no $9,602,895 "goodwill" figure arguably to add to assets in making a calculated rate of return for ReaLemon. Under the circumstances the law judge finds Dr. Greenberg's calculation, CX 294 and Tr. 295-305, to constitute a valid statement of the profitability of ReaLemon Foods after acquisition by respondent Borden, and the contention of complaint counsel, set out at the beginning of this finding, as to the comparative rates of return on assets of ReaLemon and other industry groups to be correct. In a proceeding of this nature the substance of the situation must be the guidepost, not technical matters of accounting practice.

90. Monopoly power, in the opinion of Dr. Mann, is the ability of a firm to hold a price above a competitive level for a persistent period of time (Tr. 6152). The profitability record of ReaLemon over

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the years indicated to Dr. Mann "a case study in market power" (Tr. 6131). [69]

E. The Dominance of Respondent Borden's ReaLemon Foods Conferred Substantial Resource Advantages Over Its Processed Lemon Juice Competitors

91. ReaLemon Foods spent more than $5,000,000 on advertising between 1969 and 1974 (CX 288). In contrast, competing processed lemon juice marketers spent little on advertising during this period, as already indicated (Wolcott, Tr. 648; Kendall, Tr. 542; Delaney, Tr. 690; Hansfield, Tr. 159-160). As quoted earlier, the ReaLemon 1973 Marketing Plan documented this fact by stating that ReaLemon was the only significant advertiser in the processed lemon juice industry until some minor-scale efforts of Golden Crown commencing in 1972 (CX 3, p. 772). Additionally, from 1957 through 1972 ReaLemon conducted a strong public relations program throughout the country "to tell the story of the advantage of ReaLemon" (Edelman, Tr. 3218). Promotional materials of all kinds were distributed, including news releases, recipes, pamphlets and even "Educational Kits" for use by high school students, apparently in home economics courses (see, for example, RX 202, 204, 206, 214, 217, 218-19, 220, 222, 223-230 and 378-380). ReaLemon, being the only processed lemon juice marketer with national distribution, was able to use media with nationwide coverage for advertising, including television (CX 1, pp. 339-654; CX 2, pp. 678, 681-683, 689, 693-695, 697; CX 3, pp. 767; CX 4, pp. 869-871, 886, 888; CX 9; CX 14-17; CX 20; CX 32; CX 240-42; CX 244-250; CX 253-56; RX 546; RX 553).

92. As part of the Borden organization, ReaLemon has been able to participate in tie-in advertising and cross-couponing with other Borden foods products, and has done so (CX 1, pp. 647, 653; CX 2, p. 683; CX 3, pp. 777-79, 813-14, 829; CX 4, p. 871, 888; Lundell, Tr. 3357-58; CX 81, p. 7371; CX 127, 240-242, 245, 248, 253, 255-256). In fact, ReaLemon's 1973 [70] Marketing Plan noted that ReaLemon had "significant opportunities to tie-in with other manufacturers," and discussed past use of this merchandising device with a number of other well-known products (CX 3, pp. 776-79). The 1973 Plan concluded tie-ins with other Borden products were advantageous by stating (CX 3, p. 813):

> Special consideration will be given to tie-ins with Borden brands as opposed to other manufacturers in order to effect company economics and to strengthen the overall Borden image among consumers.

93. Faced with a competitive effort by Golden Crown in the early

1970's, ReaLemon Foods developed a million dollar "President's Fund" to "support the ReaLemon Reconstituted Lemon Juice brand" (CX 3, p. 740). This fund had its origins as early as 1971 (CX 3, p. 786), and $1 million allocation from the fund in 1973 was aimed at reversing "Golden Crown share inroads" (CX 3, p. 792). The major strategy to be utilized was the use of "market-by-market case allowances." The 1973 Plan stated (CX 3, p. 792):

> The President's Fund test plays a major role in this program. Even utilizing the Basic Plan $1,604 M trade deal budget with higher expenditures in highly competitive markets and lower expenditures in low competitive markets, this total level is not sufficient to accomplish the objective of reversing the Golden Crown share gains and recovering one-half of the 1972 overall ReaLemon loss.

[71] Respondent Borden spent $2,805,000 in 1973 on promotions of its ReaLemon processed lemon juice, and another $542,000 on advertising (CX 288). The advertising budget was reduced from $1,015,000 to the foregoing figure and the expenditure on promotions was increased from $2,100,000 to $2,805,000 (CX 288). The advantages of such resources, derived from the size and dominant position of ReaLemon in the processed lemon juice industry, are obvious.

94. In fact, the 1973 Marketing Plan scheduled the "utilization of both ReaLemon and Borden internal and external leverages to implement plans" (CX 3, p. 787). These "leverages" included (CX 3, p. 787):

> (1) *External Resources (consumer oriented)*
>
> a. Consumer image
> b. Consumer advertising
> c. Shelf position
>
> (2) *Internal Resources (manufacturing and development oriented)*
>
> a. Plant and equipment capacity
> b. Plant and equipment flexibility
> c. Financial resources
> d. Management ability
> e. R & D [Research and Development] capability.

F. Respondent Borden's ReaLemon Foods Possessed the Power To Control Prices and Entry in the Marketing and Sale of Processed Lemon Juice

95. The record of this proceeding establishes, as the foregoing findings describe, that respondent Borden possessed market power in the processed lemon [72] juice industry sufficient to enable it to control processed lemon juice prices, or at least to exercise a

substantial measure of control over such prices, and to control entry by others into the marketing and sale of processed lemon juice. Respondent Borden, in short, possessed monopoly power in the marketing and sale of processed lemon juice. It had the ability to exclude or limit competition, and to control the prices competing processed lemon juice firms could charge for their products. Such firms marketed their brands of processed lemon juice essentially at the sufferance of the ReaLemon brand. That respondent Borden may not have found it expedient or to its best interest from the standpoint of profitability (see CX 2, p. 692) to exercise its control over prices or competition to the fullest extent of its power does not alter the reality shown by this record, that Borden's ReaLemon Foods possessed that power.

96. As the overwhelmingly dominant brand possessing long term public acceptance amounting to a "consumer franchise" which enabled it to charge substantially more for ReaLemon processed lemon juice than its competitors, ReaLemon, and through it respondent Borden, had the power to drive competitors' prices down, or their competing brands off the supermarket shelves, by lowering its own prices. Dr. Michael Mann testified to the market power possessed by a firm with a "successfully differentiated product" such as ReaLemon (Tr. 955–56). Dr. Mann testified that one of the effects in the marketplace of a product with the brand acceptance of ReaLemon is that a new entrant "has to find some means by which to detach customers" from such a brand. In Dr. Mann's expert opinion (Tr. 956):

> If the entrant chooses to do this by opening up a substantial price difference between itself and the existing brands in order to attract the consumers' [73] attention, and does so, then the firm in the dominant position can respond by narrowing the price differential — possibly eliminating it — and this would, one would expect, lead to a decline in the market position of the entrant or its inability to go any further than it may have captured in its initial niche on the market as long as product differentiation remains a strong and important feature of the market.
>
> If the entrant responds to the established firms' narrowing the differential by trying to keep it at the original differential which is considered necessary to detach customers, you can have a ratchet downward effect and the obvious consequence of that could be that the entrant would find its pricing going below its own average variable cost before the established firm would, and since a price below average variable cost is below what economists call a shutdown point, you would minimize losses by shutting down rather than continuing to operate.
>
> It means the entrant will be bankrupted before the established firm would be faced with the same prospect.

97. The undersigned finds from the evidence in this record that, if Borden priced its product so as to eliminate or substantially

narrow the retail price spread between its ReaLemon processed lemon juice and the brands of competitors, assuming retailer margins remained in the same ratio, sales of competing processed lemon juice brands would drastically decline. As a competitor put it, "the consumer perceives the [ReaLemon] product to be [74] superior and will pay a premium price for it," and if the products are "priced competitively or at the same price," the consumer will "buy [that] brand" (Wolcott, Tr. 647). Under the circumstances, as Dr. Mann testified, the only alternative for the competing brand would be to open the price gap by price reduction, initiating a "ratchet downward effect" ultimately driving less well known and less strong brands out of the market or into insignificant positions. Power of ReaLemon over price and competitors is evident.

98. Borden's ReaLemon competitors recognized the ReaLemon market power, and that only the presence of a price differential sufficient to induce the supermarket to stock their brand, and motivating the consumer to buy it, enabled them to survive. The president of Florida based "Tropic Fresh" testified (Tr. 547):

> We have predicated our entire business on the fact that the nationally advertised brands — and then ours would be a regional brand — we would be able to operate, because we don't have the brand recognition, we would be able to operate on the basis of price and offer the housewife a second choice of lemon juice at a lower price. This price will also influence the buyers to take our merchandise on. We have been successful over the last four or five years in convincing buyers and supermarkets they can have two brands of lemon juice on the shelf. We watch prices of our competitors very closely because that is our reason for being on the shelf.

[75] The president of Seneca testified to the same effect (Wolcott, Tr. 650):

> We look at the cost, we look at the price of Realemon, and then we decide how aggressive we're going to be in selling bottled lemon juice. I'm assuming that there is a sufficient — assuming we can sell it sufficiently under ReaLemon to give the buyer a reason to carry a second brand, and assuming that that is enough over our cost to get us a gross profit that's adequate to cover our cost and produce a net profit, then we will compete in the field more aggressively.

Golden Crown likewise maintained a substantial price difference between its reconstituted lemon juice and ReaLemon (CX 4, p. 873).

99. Respondent Borden recognized that it had the power to control prices. In its 1970 Marketing Plan, for example, it was concluded that the price spread between ReaLemon and competing brands should not be permitted to increase, and that, if it were not increased, the ReaLemon market share could be maintained close to its "present level," i.e., 88.2 percent (CX 1, p. 649). Plainly, if the

price spread were decreased, purchasers of other brands would shift to ReaLemon.

100. The high, in fact, extreme, degree of brand dominance attained by ReaLemon over the years indicates, in itself, power over prices and entry. Dr. Michael Mann made a study of product differentiation as a barrier to entry. Dr. Mann defined product differentiation as "a market characteristic in which buyers do not look at the alternative offerings of various sellers as identical" (Tr. 457). In Dr. Mann's expert opinion, as product differentiation [76] becomes a more and more important characteristic of an industry (Tr. 458-59):

> . . . [O]ne would expect that there would be an increase in market dominance. Now the reason for that is that if one conceives of a range of seller offerings, consumers having a lot of choice with respect to alternatives, that product differentiation by its very nature means that certain of these products begin to take on clear distinctions in the consumer's mind as opposed to other offerings. Those sellers who are beneficiaries of the increasing tendency of consumers to focus their attention and attachments to particular offerings of particular sellers and no longer are indifferent among the wide range will find themselves increasingly commanding most of the sales of the products to which consumers have attached themselves. So that I would expect that as product differentiation intensifies, as it becomes a more prominent characteristic of the market, that some sellers are going to command most of the sales of the market, and that you will not have a large number of sellers each with fairly small percentages of the market.

Where product differentiation increasingly characterizes a market, the dominant products are unlikely to be subject to any serious erosion of their market position because the attempt to overcome the advantage of the differentiated product "can be very expensive," and a firm attempting such a project is faced with very large costs (Tr. 459). In Dr. Mann's opinion, where high product differentiation is present (Tr. 471): [77]

> . . . one should expect to find high market concentration; one should expect to find levels of profitability which are persistently, noticeably and markedly above those earned by firms in the general class of economic activities in which they operate, and that this dominance is not easily subject to erosion.

Dr. Mann's analysis is clearly applicable to the processed lemon juice industry. Respondent's ReaLemon is differentiated from other brands to such a degree as to be virtually the generic name for the product itself. Such differentiation, the attendant dominant market share, coupled with the high profitability and premium price commanded by ReaLemon have given, and now give, respondent Borden a substantial measure of power over industry prices and the ability to restrict competition and competitive entry.

Maintenance of Monopoly Power

101. The record of this proceeding demonstrates that Borden formulated and pursued a business policy, the purpose, intention and effect of which was to maintain its monopoly power in the processed lemon juice market. As is described in greater detail later herein, Borden determined to preserve its existing dominant market share against emerging competition, and took action, primarily by means of selective local or regional price reduction strategies, to accomplish that purpose. The record also shows that although Borden suffered some erosion of market position during the years here under consideration, it did succeed in maintaining its monopoly power nationally, and in the great majority of metropolitan areas. [78]

102. At the beginning of 1970 ReaLemon possessed a 92 percent share nationwide of the processed lemon juice market, as earlier stated (CX 1, p. 639). By the mid-1960's, however, several smaller brands of processed lemon juice had established themselves in regional markets. Seneca Foods Corporation began to market its brand of processed lemon juice in competition with ReaLemon in the mid-1960's, primarily in the Northeastern United States (Wolcott, Tr. 634, 646). In the Philadelphia area, Seneca was ReaLemon's largest competitor from 1968 to 1970 (Vinocur, Tr. 2101). By 1971 Seneca was primarily established in the Northeast and North Central regions, but was obtaining some distribution in the South (CX 2, p. 671). Kendall Foods marketed its Tropic Fresh brand of processed lemon juice in competition with ReaLemon beginning in 1966 (Kendall, Tr. 573). Tropic Fresh was sold primarily in the Southeast (CX 2, p. 671). Sunkist brand of processed lemon juice, marketed since 1952, was sold in California, Texas and the Southwest, having contracted from an initially wider marketing area (Delaney, Tr. 681). Vita Pakt was sold mainly in the far West (Hogue, Tr. 404-406). There were others of relative insignificance in comparison with ReaLemon, as described earlier in connection with the relevant market and ReaLemon's monopoly position (CX 1, pp. 640-42; CX 2, p. 671; CX 3, pp. 738, 750, 759, 768; CX 4, p. 853). Additionally, there was Golden Crown, discussed in subsequent findings.

103. Golden Crown Citrus Corporation began as a Chicago based enterprise engaged primarily in home delivery of fruit juices in the Chicago area. In the late 1960's Golden Crown commenced production and marketing of its Golden Crown brand of processed lemon juice. In 1969, Paul Hansfield, later President of Golden Crown, became involved in the management and ownership of the corpora-

tion, and determined to emphasize the manufacture and sale of processed lemon [79] juice for distribution to retail outlets (Hansfield, Tr. 127-28). In that year the company began expanding sales of Golden Crown lemon juice into the Midwestern areas around Chicago. As the company grew, it moved into Eastern areas of the United States in 1970, the Northeast in 1971, the Southeast in 1972, and Southwest and Western areas in 1973 (Hansfield, Tr. 146-48). In 1973 Golden Crown also opened a second producing and bottling facility at Bridgeton, New Jersey (RX 7).

104. The most serious impact of Golden Crown's commencement of distribution to retail grocery stores of its brand of processed lemon juice initially was felt by the other regional brands in the market, particularly Seneca and Tropic Fresh. As already stated, shelf space available for bottled processed lemon juice is limited. Processed lemon juice industry members testified that there is room for only one or two brands on the shelves of most stores, and if there is room for only one brand that brand would be ReaLemon (Wrisley, Tr. 2178-79; Gordon, Tr. 3405-3406; Pripstein, Tr. 4683-84; Sherry, Tr. 3412-13; Kendall, Tr; 549-50; Wolcott, Tr. 651-52; Renner, Tr. 2603; Immekus, Tr. 1629-30; Lemmerman, Tr. 971; Rose, Tr. 4620; Vinocur, 2102-2103; H. Greenberg, Tr. 1184).

105. Most retail food stores will sell only one brand other than ReaLemon, and will purchase the cheapest of the "second" brands available (Wolcott, Tr. 664; Vinocur, Tr. 2102). As a result, when Golden Crown in 1971 entered the Northeastern area where Seneca was selling its product, with a price lower than Seneca could meet, it took sales from Seneca. Between 1971 and 1974, Seneca lost approximately three-fourths of its processed lemon juice sales (Wolcott, Tr. 654). In 1972, Pantry Pride stores in the Philadelphia area sold both Seneca and ReaLemon processed lemon juices. Golden Crown later replaced Seneca in Pantry Pride stores (Friedland, Tr. 1490-91). Frankford-Quaker Stores in Philadelphia also replaced Seneca with Golden Crown while retaining ReaLemon, because Golden Crown [80] offered a price lower than that of Seneca (Leahy, Tr. 846-47). In 1972, Golden Crown entered Tropic Fresh's markets in competition with ReaLemon and Tropic Fresh. Subsequently, Tropic Fresh was forced to withdraw from a number of those markets (Kendall, Tr. 574).

106. As its Marketing Plans make clear, by 1971 ReaLemon had begun to consider Golden Crown a serious threat to its dominant market position (CX 1-4).

A. ReaLemon Had the Purpose and Intent of Hindering and

Restraining Competing Brands of Processed Lemon Juice and of Maintaining Its Monopoly Power

107. ReaLemon's Marketing Plans for the years 1971 through 1974, and other internal corporate documents, clearly reveal the determination and intent of ReaLemon's management to maintain, in the face of competition from Golden Crown and other processed lemon juice producers, the predominant market share and monopoly position historically held by ReaLemon processed lemon juice. The Marketing Plans portray respondent's concern over the growing inroads of Golden Crown as a competitor to ReaLemon in certain markets, and the development of programs and strategies to combat the threat to ReaLemon's market share posed by Golden Crown (CX 1-4). In discussing these Marketing Plans there will be some unavoidable repetition of material contained in earlier sections of this decision because much in the Marketing Plans is highly material to the product market, and to respondent Borden's position in that market, as well as to the present section.

108. In its 1971 Marketing Plan, ReaLemon's management cited SAMI data estimating that ReaLemon lemon juice was in virtually 100 percent distribution nationwide, and that while ReaLemon enjoyed a 92 percent market share at the beginning of 1970, its nationwide market share had fallen to 88.2 percent by August of [81] that year (CX 1, p. 639). The Plan reported that beginning in 1970 competition from lower priced brands had begun to make serious inroads into ReaLemon's market share (CX 1, p. 645). Of the 10 to 12 competitiors in the bottled lemon juice business, the report identified three—Golden Crown, Seneca, and Tropic Fresh—as those causing the most difficulty (CX 1, p. 640). The report also identified a number of "key" areas in which competition posed the greatest danger to ReaLemon, as follows (CX 1, p. 640):

For the four (4) week period ending 9/4/70, as compared to the same 4 weeks a year ago, brand share in equivalent units, dropped in the following:

Milwaukee	— from 94.2% to 89.4%
St. Louis	— from 100.0% to 96.4%
Buffalo	— from 100.0% to 81.3%
Chicago	— from 91.7% to 85.7%
Cincinnati, Dayton and Columbus	— from 98.8% to 94.2%,

all of which now have Golden Crown Brand Lemon Juice for competition.

Philadelphia, under the siege of Seneca competition, has dropped from 94.5% to 85.1%. Markets presently under attack by both Seneca and Golden Crown show:

Pittsburgh	— down from 99.2% to 62.5%

Indianapolis — down from 98.2% to 88.4%.

109. The 1971 Marketing Plan set out ReaLemon's determination to maintain its approximate 90 percent market share described in the foregoing finding (CX 1, p. 650). ReaLemon recognized the problem [82] presented by the spread between the price of ReaLemon bottled lemon juice and the brands of its competitors, and decided to deal with this problem by "obscuring" the price differential for the customer. The Plan stated (CX 1, p. 650):

> Although reconstituted lemon juice is virtually indistinguishable one brand from another, heavy emphasis on the ReaLemon Brand name through its media effort should create such memorability for the brand, that an almost imaginary superiority would exist in the mind of the consumer, a justification for paying the higher price we are asking.
>
> • • • • • • •
>
> . . . [T]he reflection of this spread at retail level must be obscured for the consumer. To accomplish this, more advertising and promotional monies will have to be spent in 1971.

Steps were planned, nevertheless, to combat competing brands in specific markets where they had been making inroads by reducing the price spread between ReaLemon and such brands. Couponing as a method of attacking the spread was considered (CX 1, p. 653) but, more important, the ReaLemon practice of conducting trade promotions on a uniform, nationwide basis was abandoned permitting an attack on competing brands in specific markets, as follows (CX 1, p. 656):

> . . . In those markets where competition has been making inroads, tentative plans are to increase the size of the [promotional] allowances to as much as $1.20 per case, or 10¢ per bottle. Based on past history, [83] it is hoped that the trade will reflect reduced retails of as much as 15¢ per unit. We will again be specifically attacking the problem of the retail price spread between ReaLemon and competition. In general terms, competitive activity exists in the Eastern half of the United States and for the Western Half, promotional allowances will be limited to a range of 60 to 75 cents per case.

110. Between 1967, which year ReaLemon noted marked "the advent of competition," and 1970 the ratio of expenditures for advertising and promotions shifted substantially toward the latter "because of competition" (CX 1, p. 646). Promotions, that is, allowances to retailers off invoice on a per-case basis, were particularly adapted to attacking competing brands in specific markets (CX 1, p. 656).

111. By the time the 1972 Marketing Plan was developed,

ReaLemon's estimated share of the bottled lemon juice category, based on "SAMI" data, was still about 90% (CX 2, p. 668). Of the 10 to 12 small competitors in the market, none with a market share of more than 3-4%, particular attention was given to Golden Crown. The Plan stated that Golden Crown had had good success in the Northeast and North Central regions, and had begun to expand into the South (CX 2, p. 675). However, Golden Crown, Seneca and Tropic Fresh were all listed as serious competitors, each of them reported as substantially undercutting ReaLemon's price (CX 2, p. 671). The 1972 Marketing Plan set forth ReaLemon's "basic platform for 1972" which included as a "specific objective" combatting "low priced competition" (CX 2, p. 690). ReaLemon recognized this low priced competition as its most serious threat, and determined to use both trade promotions and advertising to combat it (CX 2, p. 671). [84]

112. The use of trade promotions to restrict competition is clear. In the face of "low priced competition" from other processed lemon juices, trade promotions became "a tool or lever against competition" (CX 2, p. 688), an "important tool in dulling the efforts of competition" (CX 2, p. 700). ReaLemon considered it of "paramount importance that ReaLemon continue to be the featured brand at the retail level," which localized promotions were effective in bringing about, because that (CX 2, p. 679):

> . . . is probably the most restrictive thing to the growth of our competition.

Promotions were key tools in reducing the price spread between ReaLemon and lower priced competing brands. During promotions the retail price of ReaLemon ordinarily dropped 10 cents or more below its regular retail price (CX 2, p. 677, 700).

113. Advertising was also to be used to prevent erosion of the ReaLemon brand in the face of competition from lower priced brands (CX 2, p. 672). Spot radio commercials were begun in 1971 in nine local markets where ReaLemon was facing competitive pressure. The radio spots were described as follows (CX 2, p. 683):

> The spot radio creative approach keyed in directly on bottled competition by telling consumers not to accept imitations, and that other bottled lemon juices may try, but none can imitate REALEMON. Commercials were executed using a conversational technique employing someone who was an impersonator and an announcer asking the impersonator to do his impression of a bottle of REALEMON. Commercials then stressed the point that no one can impersonate a bottle of REALEMON. [85]

114. In its 1973 Marketing Plan, ReaLemon's management stated that one of the crucial events affecting the company in 1972 was (CX 3, p. 736):

The recognition of other growing brands within the competitive environment, and the adoption of a positively oriented strategy to continue the growth and retain the market position of ReaLemon Lemon Juice.

The report noted that according to "SAMI" statistics ReaLemon's dollar share of the lemon juice category declined by 3.4 percentage points, from 91.4% to 88.0%, during the first seven months of 1972 (CX 3, p. 737). The pace of the decline had increased toward the end of those months as shown by the following chart (CX 3, p. 737):

REALEMON $ SHARE OF LEMON & LIME JUICE CATEGORY

	1970/1971	*1971/1972*	*SHARE POINT CHANGE*
AUG-OCT	91.4	91.1	- .3
NOV-JAN	92.6	91.3	- 1.3
FEB-APRIL	92.4	89.0	- 3.4
MAY-JULY	90.4	86.2	- 4.2

115. The 1972 Marketing Plan reveals ReaLemon's recognition that Golden Crown had become its primary competitor (CX 3, p. 738):

Competition
During 1972 the competitive environment in the lemon and lime juice category has been significantly altered versus previous years. A comparison of SAMI data between 1971 and 1972 indicates the emergence of Golden Crown as the dominant factor within this segment. [86]

	Year Ending 12/25/70	*Year Ending 12/24/71*		*7 Months Ending 8/4/72*		
	Share	*Share*	*Share Point Change*	*$*	*Share*	*Share Point Change from 1971-7 Mos. Period*
Golden Crown	1.4	2.4	+1.0	1092	5.5	+3.2
Seneca	2.0	1.5	-0.5	218	1.1	-0.7
Sunkist	2.1	1.7	-0.4	278	1.4	-0.3
All Others	2.7	3.0	+0.3	1826	4.0	+1.1

Nielsen data for the June/July period indicates that Golden Crown dollar share of the lemon and lime juice category is 5.1% while the volume share is 9.7%.

	$ Share	*Volume Share*	*All Commodity Volume % Distribution*
Golden Crown	5.1	9.7	21
Seneca	.9	1.4	5
Sunkist	1.4	1.3	9
All Others	13.0	8.0	—

Golden Crown's share in some metropolitan areas was considerably

larger than that reflected by national market share statistics (CX 3, pp. 760-61, 838). Golden Crown achieved inroads into the processed lemon juice market and into ReaLemon's market share through aggressive price competition. Golden Crown's 32 oz. size lemon juice, as noted, undersold ReaLemon by 10¢ to 30¢ per bottle (CX 3, p. 738).

116. The 1973 Marketing Plan reiterated that ReaLemon had "a dominant market position and . . . a strong consumer franchise," and stated the following among "Problems and Opportunities" for 1973 (CX 3, p. 750):

> (D) Reverse competitive inroads of Golden Crown.

Projecting an increase of cash sales of all bottle sizes for 1973 of 6 percent, ReaLemon's 1973 Plan stated (CX 3, p. 790): [87]

> These [share] gains can only be achieved *through both a reversal of Golden Crown share inroads* and increased category growth. (Emphasis added.)

117. ReaLemon's announced objective was to regain during 1973 one-half of the lemon juice market share lost to competitive brands in 1972, bringing its nationwide market share from an estimated 86.5 percent back to 89.0 percent (CX 3, pp. 790-91). The report stated that this objective was aimed at all competing brands, not just Golden Crown (CX 3, p. 790):

> [T]he share gains from reversing the 1972 trend must be viewed *not* against Golden Crown total market share but against the share of all brands other than ReaLemon. (Emphasis in original.)

118. In another part of the 1973 Plan, a seven-phase "Golden Crown Strategy" in entering new markets was outlined because (CX 3, p. 764):

> A recognition of the Golden Crown strategy will enable ReaLemon to take more positive steps in reversing the Golden Crown trend in 1973.

In order to combat Golden Crown, ReaLemon's objectives for 1973 included the following (CX 3, p. 764):

> Reducing the price differential through trade and/or consumer promotional vehicles.

The strategy was to concentrate trade (promotional) allowance spending in specific heavily competitive markets (CX 3, pp. 788, 792). Aggressive "market-by-market activities" were determined upon rather than "overall national programs." Market potential in [88] combination with "problem area analysis" were to determine the

"level" and "type" of activity required (CX 3, p. 786). The primary objective of these activities according to the Plan (CX 3, p. 786):

. . . will be to regain market share lost primarily to Golden Crown, a price oriented brand.

119. List price reductions, either nationally or on a market-by-market basis, were rejected (CX 3, p. 793). Instead, "trade deal activities" were relied upon to obtain store displays and lowered retail prices, as already indicated (CX 3, p. 781).

120. ReaLemon's "1973 Basic Plan" called for $1,604,000 to be spent on trade deal promotion, with an additional $400,000 to $800,000 being added under two alternative "President's Fund" programs (CX 3, pp. 783, 788, 799 and 832). ReaLemon attempted to determine the most effective level of case allowance activity in markets identified according to the degree of competition present (CX 3, p. 784). Thus, 1973 deal activities were to be at varying levels depending on the competition present in the market (CX 3, pp. 787, 788, 792, 817-18). ReaLemon spent $2,805,000 on 1973 promotions, or $705,000 *over* the amount previously budgeted for all promotional activity (CX 288). These trade deal promotions were directed at competitive brands in specific markets, particularly Golden Crown. Their purpose was "reversing competitive gains" (CX 3, p. 789) and "[r]eversal of Golden Crown Share Inroads" (CX 3, p. 792). Advertising was also planned for "strengthening of the consumer franchise to justify the ReaLemon price premium" (CX 3, p. 764). [89]

121. ReaLemon recognized that pricing was Golden Crown's major competitive tool. In the 1974 Marketing Plan price comparisons between ReaLemon and Golden Crown for 1973 were made as follows (CX 4, p. 854):

		February/March	*April/May*	*June/July*
Total U.S.		[¢]	[¢]	[¢]
ReaLemon	32 oz.	61.5	61.7	61.6
ReaLemon	24 oz.	63.5	63.2	61.6
Golden Crown	32 oz.	47.1	47.6	46.3

Price affected retail food store margins as well as cost to the consumer, and ReaLemon's management recognized that retailer margins were important to a competitor's ability to secure distribution, shelf space, display and feature activity (CX 4, pp. 854-55). The 1974 Marketing Plan therefore compared retailer margins for ReaLemon and Golden Crown 32-oz. bottles (CX 4, p. 855):

	April/May 1973		*June/July 1973*	
	ReaLemon	*Golden Crown*	*ReaLemon*	*Golden Crown*
Avg. Gross Price	6.75	4.40(E)	6.73	4.40 (E)
Avg. PPA Value	0	0	1.33	.25
Avg. Net Retailer Price	6.75	4.40	5.40	4.15
Consumer Cost	0.62	.48	0.62	.46
Retailer $ Margin	0.69	1.36	2.04	1.37
Retailer % Margin	9.3	23.60	27.4	31.10

It can be seen from these comparisons that ReaLemon's trade promotions, *i.e.*, price promotional allowances ("PPA"), had the effect of increasing retailer margins, tending to shift supermarket purchases back to ReaLemon, as well as the effect of decreasing retail prices. [90]

122. The 1974 Marketing Plan recited that one of the objectives of 1973 marketing activities, already described, had been to forestall growth of Golden Crown in established markets, and its expansion into new markets through more aggressive trade-oriented activities (CX 4, p. 856). ReaLemon analyzed its 1973 trade promotions, which were raised to levels 2 to 3 times above those of 1972, in terms of their effect on the expansion of Golden Crown sales (CX 4, pp. 857-58), noting that containment of Golden Crown distribution of 10-ounce and 16-ounce sizes was a major objective of the increased deal levels (CX 4, p. 857). It was concluded that the results of the program were as follows (CX 4, p. 858):

(1) Heavy deal levels on 24 oz. and 32 oz. did not preclude Golden Crown distribution growth. The degree to which this retarded even faster expansion is not known.

(2) Heavy deal levels on 8 oz. and 16 oz. may have prevented Golden Crown expansion on these sizes.

In summary, the Plan concluded that 1973 had seen the continued growth of Golden Crown in terms of share and distribution, despite a continued shift of promotional expenditures to trade deal activities in response to competitive conditions (CX 4, p. 861).

123. ReaLemon established a "Marketing Mix Strategy," again with the major objective of increasing ReaLemon's share of the market in high lemon juice per capita consumption areas (CX 4, p. 861). This objective was to be accomplished through a marketing program which utilized a combination of [91] advertising, consumer promotion and trade promotion activities (CX 4, p. 861). Specifically, ReaLemon planned to increase its market share in 4 "key Districts," New York, Philadelphia, Chicago, and Detroit. These 4 markets accounted for 38.4 percent of ReaLemon's sales and 54.7 percent of

Golden Crown's sales during February-July 1973 (CX 4, p. 864). The objective was to reduce Golden Crown's market share by 20 percent, or from 18 percent in 1973 to 14 percent in 1974, while ReaLemon's share was to rise from 71 percent to 75 percent. ReaLemon's 1974 Plan stated (CX 4, p. 864):

The share objectives are to reduce Golden Crown share by 20%.

ReaLemon concluded that the above major metropolitan areas represented "high development of Golden Crown" and the "highest per capita consumption markets of lemon juice," and that by aiming at those markets ReaLemon would have the following effect (CX 4, p. 864):

Decreasing Golden Crown effectiveness in these markets may result in significant reduction of expansion leverage.

Trade deal levels in the above four key areas of New York, Philadelphia, Chicago, and Detroit were to be continued at $2.25 per case, as part of the effort to reduce Golden Crown's share by 20 percent, but trade deals in all other areas were to be reduced by approximately 30 percent (CX 4, p. 872).

124. The 1974 Marketing Plan reviewed the "overall advertising and promotion budget" for the years 1972 through 1974. The figures reviewed show [92] great increases in all categories of promotion, especially in the trade deal (price promotion allowance) areas, as follows:

	1972 $	*1972* %	*1973* $	*1973* %	*1974* $	*1974* %
Bottled Lemon Juice	2197	81.3	2465	83.9	4147	90.5
Working Adv.	765	28.3	389	13.2	1201	26.2
PPA & Co-Op & F.G.	1341	49.6	1961	66.7	2238	48.9
Consumer Promo.	0	0	21	.7	558	12.2
Other Expenditures	91	3.4	94	3.2	150	3.3

See CX 4, p. 865. These great increases were directed at competition, had the purpose of maintaining ReaLemon's predominant share of the processed lemon juice market, and were aimed in particular at Golden Crown (CX 4, p. 866). The Plan specifically stated that the "Trade Deals" and "Consumer Promotion" elements of the program

had an area of major effectiveness to "*Directly Combat Golden Crown*" (CX 4, p. 866).

125. Money for ReaLemon promotions was budgeted for 1974 at $2,888,000, an increase of $788,000 over 1973, which included $2,238,000 for trade deals and about $558,000 for consumer promotions (couponing) (CX 4, pp. 887-88; CX 288). This increase was clearly directed at competitive brands, in particular, Golden Crown (see, for example, CX 4, p. 866). Indeed, the expenditures of ReaLemon for advertising and promotion grew, between 1967, which year marked the "advent of competition" (CX 1, p. 646), and 1974, from $2,277,000 (CX 1, p. 646) to $4,379,000 (budgeted - see CX 288), an almost 100 percent increase.

126. As stated in earlier sections, in 1974 ReaLemon planned to increase its wholesale list prices, but not in the "highly competitive Golden Crown markets." The 1974 Plan stated (CX 4, p. 873): [93]

> . . . ReaLemon bottled 32 oz. will be increased in markets accounting for only 50% of total volume. The 50% of volume not increased represents the highly competitive Golden Crown markets concentrated in Region 1 and part of Region 2.

127. Robert Taft, former Regional Sales Manager for ReaLemon in the Northeastern United States, testified that Golden Crown was regarded as a serious threat to ReaLemon in the Northeast in 1972, and he considered that it was his objective as a ReaLemon employee to restrict the growth of Golden Crown insofar as necessary to maintain ReaLemon's "historic market share." He estimated that in 1971 and 1972 ReaLemon's market share in the Northeastern markets was in excess of 75% (Taft, Tr. 1317-19).

128. ReaLemon National Sales Manager expressed on many occasions in communications with Borden or ReaLemon personnel his determination to preserve ReaLemon's traditional market position in the face of Golden Crown competition. In July 1974 ReaLemon's National Sales Manager wrote to one of his Regional Sales Managers of his concern that ReaLemon's share of the Pittsburgh market had fallen to 85% (CX 81, p. 7316):

> I am attaching the April/May and May/June SAMI figures for Pittsburgh.
>
> • • • • • • •
>
> The Golden Crown sales figures tripled . . . while our quart figures . . . went up very slightly.
>
> At this time we have continued to go down in market share to where we are now at only 85%. I would like your comments.

277-685 O—79——47

[94] In October of 1971, the National Sales Manager wrote to Mr. Bud Crane about the Detroit market (CX 81, p. 7308):

Isn't there something we can [illegible] the store level to slow them [Golden Crown] down a little.

In January 1972 he admonished ReaLemon's New Orleans broker to do his best to see that Golden Crown did not secure any "placements" in the New Orleans area, as follows (C[illegible]161):

We know that you will stay right on top of this situation and do your best to see that they [Golden Crown] do not secure any placements but in the event they would, I know you will make certain we are clobbering them at retail.

On June 6, 1972, ReaLemon's National Sales Manager wrote to another Regional Sales Manager (CX 81, p. 7289):

I trust that we are doing everything possible to see no further such quantities of Golden Crown are shipped into these [Miami, Jacksonville, and Birmingham] markets.

Several months earlier he had written to the ReaLemon broker in Detroit (CX 81, p. 7307):

Do you have any brilliant ideas how we can more effectively combat this [Golden Crown movement] at the store level.

In November 1973 ReaLemon's National Sales Manager reported to an official of the Borden Foods Division in the Chicago area on the progress of the effort to [95] restrain Golden Crown in major metropolitan areas in the Midwest, as follows (CX 81, pp. 7478-79; emphasis added):

CHICAGO

. . . I am confident that with the momentum we are building right now that we are going to be in excellent shape in 1974 to expand ReaLemon sales in the Chicago area *and at the expense of Golden Crown.*

DETROIT

. . . I am confident that we can pick up with some programs that are not only going to enhance our sales in the area *but are going to substantially to detract from Golden Crown sales.*

• • • • • • •

MILWAUKEE

Milwaukee is pretty much the same as Indianapolis and here again, I think it is just a matter of getting a little more cooperation on the part of the trade during our promotions *to again begin increasing ReaLemon at the expense of Golden Crown.*

• • • • • • •

ST. LOUIS

Golden Crown secured some new distribution in this area and as a result we slipped somewhat. . . . [W]e [96] are going to have to try harder to get straight truckloads of ReaLemon shipped to the major accounts in the area during our promotional periods and at the same time make certain that ReaLemon is the item to be promoted at key times during the year.

In another letter on the same date to a Borden Foods Division official in New York City, the ReaLemon National Sales Manager reported on progress restraining Golden Crown in major East Coast markets (CX 81, pp. 7439–40; emphasis added):

• • • • • • •

PHILADELPHIA

I am confident that we can begin curtailing their [Golden Crown] growth. . .

• • • • • • •

PITTSBURGH

Here we have made nice progress not only increasing ReaLemon sales dramatically *but also lowering Golden Crown's share.*

BOSTON

. . . I am confident that from this point on *we can contain any additional Golden Crown growth* and begin rebuilding ReaLemon sales. [97]

• • • • • • •

BUFFALO

. . . I am confident . . . that our holiday promotion is going to start reversing this trend as I think Golden Crown has gone about as far as they can . . . and from hereon it is just a matter of getting ReaLemon promoted as often as possible which will not only increase our sales but *at the same time begin substantially slowing down Golden Crown.*

129. The Regional Sales Manager of ReaLemon based in Jacksonville, Florida, instructed the ReaLemon broker in Miami in January 1972 to take steps to retard Golden Crown expansion (CX 132):

. . . The Golden Crown deal with Hills Bros. . . . You may use some free goods (QUARTS) to work the Hills stores. Order these quarts and make sure the large stores have floor displays on our quarts. Work this out to [sic] the price is at 69¢ with the free goods. If Golden Crown does not move at Hills, I am sure that Charley will not continue the deal until June 24th.

130. In August 1971 another ReaLemon Regional Sales Manager responsible for the Minneapolis area wrote the ReaLemon broker in that area planning methods to restrict or exclude Golden Crown, pointing out ReaLemon's success in that effort elsewhere (CX 81, p. 7293): [98]

In many areas where they [Golden Crown] attempted to gain a foothold we were quite instrumental by putting a concentrated effort at all levels in keeping their sales to a minimum and in many cases they left the market completely.

B. ReaLemon Utilized Discriminatory Area Pricing and Promotions To Hinder and Restrain Competing Brands and To Maintain Its Monopoly Power

The record of this proceeding demonstrates a course of conduct undertaken by respondent Borden, through ReaLemon Foods, to hinder and restrict the ability of other processed lemon juice marketers, particularly Golden Crown, to compete in local and regional markets. The specific activities and practices revealed by the record took place primarily in the Northeastern region of the United States, and particularly in the cities of Philadelphia and Buffalo, and included the following:

1. Different list prices were maintained in different areas to combat competition

131. ReaLemon processed lemon juice is marketed under a zone pricing system. The country is divided into three zones, each with separate list prices. Zone 2 generally encompasses the Northeastern portion of the United States, Zone 1 includes North Central and Midwest states, and Zone 3 covers the South and West. In the past ReaLemon lemon juice has been priced up to 35 cents per case lower in Zone 2 than in Zones 1 and 3, which ordinarily have had identical prices (CX 37-54). Prices in Northeastern areas have been lower than those in the remainder of the country despite the fact that Borden's average cost of manufacturing cases of ReaLemon quarts was 19 cents more at its Eastern plant than at its Chicago plant in [99] 1971, 17 cents more in 1972 and 4 cents more in 1973 (CX 293). Nor did this price differential result from a lower cost of distribution in the Northeastern region, for prices in that region were lower than those in the remainder of the nation even for goods sold FOB plant or picked up by the buyer at the plant (CX 37-54). In short, in the Northeast where ReaLemon faced Golden Crown competition beginning around 1971, ReaLemon maintained lower list prices than in the balance of the country.

132. The price lists in the record show that ReaLemon had a uniform nationwide pricing system in 1967 and 1968 (CX 34-36), moved to a two-zone system in 1969 (CX 38), and instituted the present three-zone system in 1970 (CX 37, 39-54). Previously in the 1950's prior to acquisition by respondent, ReaLemon had utilized zone pricing "to more closely meet the Sunkist [processed lemon juice] price" in the Eastern United States (Saving, Tr. 2586-87). In 1958 Sunkist retrenched in its processed lemon juice marketing because of the "highly competitive" situation it faced (Delaney, Tr. 682), and now markets that product in the Southwest, mainly California and Texas (Delaney, Tr. 681). The zone pricing system allowed Borden to maintain lower list prices in areas where it faced competitive pressures. See ReaLemon's 1974 Marketing Plan, which has been quoted earlier, in which price increases were instituted in those portions of the United States where ReaLemon had little competition, but were not made in "highly competitive Golden Crown markets" (CX 4, p. 873). In other words, respondent Borden maintained lower prices in some geographic markets to combat competition of other processed lemon juice brands, particularly Golden Crown. [100]

2. Different promotional allowances were maintained in different areas to combat competition

133. Since at least 1969 ReaLemon has offered three or four trade promotions per year. These trade promotions were used primarily to increase sales of the 32-ounce size of ReaLemon reconstituted lemon juice (or the 24-ounce size in areas where it is the largest size sold), and usually covered the periods around Memorial Day, midsummer, and Thanksgiving-Christmas, with a fourth during Lent having been added in 1973 (CX 9-11, 14-20, 22-29, 31-33; Peters, Tr. 1787-88). Promotional allowances were offered on an off-invoice, bill-back, or off-invoice plus coupon basis, or a combination thereof (CX 9-11, 14-20, 22-29, 31-33; Peters, Tr. 4465). ReaLemon sold approximately 71 percent of its largest selling 32-ounce size "on deal" in 1972, 84 percent in 1973 and an estimated 77 percent in 1974 (CX 4, p. 872).

134. Promotional allowances are intended to induce a retailer to promote the manufacturer's product or to offer it for sale at a reduced price (Saving, Tr. 2516). Some of ReaLemon's promotions did not require promotional services by the retailer, and buyers could accept the allowance, but promote the product only if to do so were of value to them (Saving, Tr. 2514-16). For those promotions which did require performance, one of the performance options was generally a

reduced retail price (Saving, Tr. 2541). ReaLemon's price promotions essentially amounted to price reductions (Peters, Tr. 4480).

135. During the late 1960's, ReaLemon's price promotional allowances were offered on a uniform nationwide basis, and gradually increased from an average of 60¢ a case to about 90¢ per case (Peters, Tr. 4467-68). [101]

136. In 1971 ReaLemon switched from a uniform national promotion program to a policy of tailoring promotions to particular marketing areas, and increased the allowance in the summer of 1971 to $1.25 per case in 15 of its highest volume Eastern markets (CX 3, p. 783). It was in these Eastern markets that ReaLemon faced growing competition, and the increased allowance was intended to combat such competition by reducing the retail price spread between ReaLemon processed lemon juice and its competition in those areas (CX 1, p. 656).

137. After returning briefly to a nationwide promotional basis, ReaLemon for the 1972 Thanksgiving-Christmas program again began using local promotions and increased the level of its allowances on the 32-ounce and 24-ounce sizes in a number of metropolitan areas (Peters, Tr. 4470-71). Higher allowance levels of 90¢ per case for one promotion and $1.80 for two, were offered in New York City, Hartford, Philadelphia, Cleveland, Pittsburgh, Baltimore, Detroit and Chicago (CX 19, 23, 180). Of these cities all except Pittsburgh were listed as "Highly Competitive Markets" in ReaLemon's 1973 Marketing Plan (which was written in September 1972). Pittsburgh was listed in that document as a "Moderately Competitive Market" (CX 3, p. 838). Allowances of 75¢ for one promotion and $1.25 for two, less than those mentioned above, but greater than those available in the remainder of the country, were offered in Milwaukee and Atlanta, two cities classed as "moderately competitive" (CX 19, 23, 180; CX 3, p. 838). The remaining less competitive areas of the nation were offered a substantially smaller allowance of 60¢ for one promotion and 90¢ for two (CX 19, 23, 180). [102]

138. ReaLemon's President testified that the increased allowances offered during the Thanksgiving-Christmas period of 1972 were utilized in order to regain sales lost earlier in the third quarter of 1972, when allowance levels had been reduced to 60 cents per case (CX 22, 180), and to allow ReaLemon's brokers, who were about to be replaced by Borden's direct sales force, to increase their commissions in their final year (Peters, Tr. 4470-71). However, those reasons cannot apply to those areas where the allowance remained at the 60 cents per case level. It is clear from the Marketing Plans already

discussed, on the contrary, that the increase in promotional allowance in selected markets in 1972 and later years was an effort to restrict sales of competing brands in those markets, primarily of Golden Crown, by lowering the price differential between ReaLemon and such brands.

139. In 1973 ReaLemon retained the promotional differentials, with the highest allowances available in its most competitive markets. During the spring promotion of that year, an allowance of $1.50 per case of quarts was offered in the highly competitive cities of the Northeast and North Central regions (CX 27-28, 180). In Philadelphia, the deal level was further increased after its announcement to the trade, when in March 1973 Borden's Philadelphia district manager advised Borden's customers that the announced 32-ounce promotion would be raised to $1.80 (Sankey, Tr. 4731-32; RX 561). An even higher allowance level, of $2 per case of quarts, was offered in Atlanta, Florida and Dallas, with $1.50 levels prevailing everywhere else in the Southeast (CX 27-28, 180). Atlanta, Dallas and three cities in Florida, Miami, Tampa and Jacksonville, as well as several other cities in the Southeastern region, were listed as "Moderately Competitive Markets" in the 1973 Marketing Plan (CX 3, p. 838). Jacksonville/Tampa, Atlanta and Birmingham were also categorized as "Well Developed" Golden Crown markets in that same document (CX 3, p. 760). [103]

140. Deal levels prevailing in markets where significant competition was not present provided only for allowances of 50¢, 75¢ and 90¢ on 8-ounce, 16-ounce and 32-ounce sizes of ReaLemon, respectively (CX 27-29, 180). Promotion allowance levels were thus tailored to combat the particular competitive condition found in local or regional areas, with deal levels increasing markedly in those areas in which Golden Crown or another competitive brand of lemon juice was either a significant factor or attempting to establish a foothold.

141. ReaLemon's policy of offering higher promotional allowances in areas experiencing competition from Golden Crown continued during the price promotion of July-August 1973. One of the options available to customers in New York City and the Philadelphia area was a $1.80 per case allowance on quarts plus one case free with every 15 purchased (CX 29; CX 4, p. 893). As had already been stated, Philadelphia was listed in the 1973 Marketing Plan as a "Highly Competitive Market" (CX 3, p. 838). New York City was also listed as "Highly Competitive," and was ReaLemon's highest volume market in dollar sales (CX 3, p. 838). Other areas received substantially lower allowances than those granted in

competitive areas in the North Central, Southern and Colorado regions (CX 29; see CX 3, pp. 760, 838).

142. The winter of 1973 saw promotional allowances reach their highest level of $2.25 per case in selected cities (Peters, Tr. 4473–76; CX 30). Such allowances were granted to customers in the Northeast and in the City of Chicago (the remainder of the district containing Chicago received only $1.20 per case). Florida, North Central areas and most large metropolitan areas were given allowances of $1.50, the remainder of these latter districts receiving allowances of 75¢ per case. Areas of the West in which little competition was present were offered allowances of only 60¢, 75¢ and 90¢ on the 8-, 16- and 24-ounce sizes (CX 31).

143. The spring 1974 promotion followed the pattern of that in the winter of 1973, except that the highest allowance offered was $2. New England, [104] New York City, Philadelphia and Chicago were offered this allowance. New York State, Western Pennsylvania, the Middle Atlantic States, Michigan, Indiana, Ohio, Florida and Denver received $1.80 per case; remaining areas were offered only from 90¢ to $1.50 per case (CX 33).

144. ReaLemon's 1974 Marketing Plan identified four "key Districts," accounting for a large percentage of both ReaLemon's and Golden Crown's sales volume, in which ReaLemon was determined to increase its market share at the expense of Golden Crown. It was hoped that checking Golden Crown in these areas would impair its ability to expand into other markets (CX 4, p. 864). In fact, three of these four cities, New York, Philadelphia, and Chicago, were among the five areas in the winter 1973 promotion, and four areas in the spring 1974 promotion, which were offered the highest allowances available, that is, $2.25 and $2 per case, respectively. The fourth of these cities, Detroit, received in both promotions an allowance of $1.80 per case, higher than that offered customers in many other areas of the nation (CX 31, 33; CX 4, p. 894).

145. In accordance with the strategies set forth in the marketing plans heretofore discussed, Borden used its price promotional allowance (PPA) program to combat Golden Crown and other brands of reconstituted lemon juice. Large per case promotional allowances, as described, much increased over levels prevailing before the advent of substantial competition from other brands of lemon juice, were offered in those areas where competition was present, while customers in areas not experiencing competition were offered much lower promotional allowances. ReaLemon's customers treated the promotional allowances as net wholesale price reductions and took account of the allowances in calculating the net cost for the item

(Lemmerman, Tr. 978; Gerace, Tr. 1992-2021; CX 203-215; Moreland, Tr. 1036-1117; CX 219; CX 310; CX 312; H. Greenberg, Tr. 1214-38, 1248). These price [105] reductions were reflected in the retail price of ReaLemon. Prices on its 32-ounce size, which after an April 1971 price increase regularly ranged from 69 cents to 79 cents in supermarkets, with the reduced prices on "special" in the 59-cent to 69-cent range (CX 2, p. 677), declined to the 39-cent to 49-cent range in some markets in 1973 and 1974 as a result of the increased promotional allowances (CX 81, pp. 7306, 7458, 7461, 7463, 7471, 9038; CX 93, 101, 181-183, 188-189, 191, 312).

146. As emphasized herein, since ReaLemon was by far the dominant and premium brand, elimination or reduction of its retail price, and the consequent narrowing or elimination of the price spread between it and brands with little or no consumer acceptance, had the capacity to hinder or stop sales of the latter.

3. Different net prices were charged different customers to combat competition

Philadelphia

147. Acme Markets, with a 20 to 28 percent share of the Philadelphia retail grocery market, was the largest supermarket chain and price leader in that city (Vinocur, Tr. 2098-99; H. Greenberg, Tr. 1184). Philadelphia, as has previously been noted, was one of ReaLemon's high volume markets and one listed in ReaLemon's Marketing Plans as "Highly Competitive." In 1972, 1973 and 1974, ReaLemon granted to Acme Markets in Philadelphia promotional allowances greater than those offered or given to competing Philadelphia area food retailers. The purpose and effect of the higher promotional allowances granted Acme in 1972 was to keep Golden Crown out of Acme supermarkets by, in effect, selling Acme its requirements of bottled lemon juice. An additional purpose after 1972, when Acme did stock [106] Golden Crown, was to hinder sales of the latter by narrowing or eliminating the price spread between ReaLemon and Golden Crown, as well as any other competing brands. The details of these promotional allowances are discussed below.

148. Until the end of 1973, ReaLemon had a cooperative ("coop") advertising allowance program in addition to its seasonal price promotional allowance programs (Peters, Tr. 4480-82). Under the coop program, customers would accumulate money for each case of ReaLemon purchased during the year. The accrual rates for 1971 through 1973 were 15 cents per case of quarts, 12 cents per case of 24-

ounce bottles, 17 cents per case of 16-ounce bottles, 14 cents per case of 12-ounce bottles and 11 cents per case of pints (Peters, Tr. 4481; CX 62, 70, 74). A record of each customer's accruals was maintained by Borden. The customer could earn and receive his money by rendering advertising or promotional performance specified by agreement with Borden, and by submitting a request to Borden for payment (Peters, Tr. 4481; CX 62, 70, 74, 94-100).

149. In 1972 Acme Markets in Philadelphia was granted a 60-cent per case coop allowance for a special purchase of ReaLemon quarts in May or June of that year. This amount is four times the normal 15-cent coop accrual on quarts. Acme sent its trucks to ReaLemon's Bridgeton, New Jersey, plant to pick up the lemon juice and delivered the product directly to its stores. Mr. Taft, the Regional Sales Manager for Philadelphia, described the transaction and testified that although it was originally set up on a bill-back basis, he believed Acme had deducted the allowance from its payments for the order rather than billing back (Taft, Tr. 1299-1301; CX 303, p. 20).

150. During the same time period, Food Fair Stores in Philadelphia received a 50-cent per case coop allowance on ReaLemon quarts for the spring promotion (Taft, Tr. 1303-1304; CX 100; CX 303, p. 18). [107]

151. Mr. Taft testified that the higher allowance "could" have been given to Acme for competitive reasons, for most of the promotional programs were designed to "maintain ReaLemon's position against increasing competition" (Taft, Tr. 1305-1308). At first Mr. Taft indicated that Acme received the extra 10 cents per case allowance because it picked up the lemon juice from the ReaLemon plant, but Food Fair also picked up from the ReaLemon plant as did most ReaLemon supermarket customers in the Philadelphia area (Taft, Tr. 1304-1305, 1309-1310, 1322-1323; Friedland, Tr. 1497-1498). The decision to offer Acme the 60-cent allowance was discussed with Mr. Saving, ReaLemon National Sales Manager, and Mr. Vinocur, Acme Accounts Executive for the ReaLemon broker in Philadelphia (Taft, Tr. 1308). Mr. Taft further testified that because of the allowance, Acme made a very heavy purchase of ReaLemon processed lemon juice. As a result, in Taft's words (Tr. 1310):

> . . .The substantial distribution effectively shut out, for the summer, the purchase of Golden Crown because they [Acme] put so much in the stores they [Acme] weren't going to be in the market until at least September or October.

• • • • • • •

Q. They, being Golden Crown?

A. They wouldn't be in the market to entertain another competitive lemon juice for some time.

Q. Acme would not be in the market? [108]

A. Acme would not be in the market because the distribution of the range [sic] was substantial. If my recollection is correct, it was approximately 130 stores or 150 stores, and over a hundred of those got 2 pallets, which also, if my recollection is correct, would be 110 cases, and that is a fairly substantial amount to carry a single, given store for quite a time, depending on the weather. If you got 110 degree weather for a week, it might not be so long.

Because of Acme's purchases of ReaLemon, Mr. Vinocur advised Mr. Taft, Acme was unable to take advantage of two "lucrative presentations," presumably made by representatives of competitive lemon juices (Taft, Tr. 1310–11; CX 111).

152. Taft testified that Food Fair would have received the same 60-cent allowance given to Acme had Food Fair "achieved a similar performance figure" (as Acme), because it would "have helped our competitive situation there" (Taft, Tr. 1322). In other words, had Food Fair purchased a similar amount of product and distributed it directly to its stores, with the result that those stores "were what you might call stocked with lemon juice for a fairly considerable period of time" (Taft, Tr. 1324), it would also have received the additional allowance (Taft, Tr. 1322–24). Although Mr. Taft testified that there was no express agreement by Acme not to purchase a competitive lemon juice, it was his understanding that, as a result of the promotion, Acme would not purchase another brand at least for the year 1972, because it had purchased so much ReaLemon as not to need to purchase any other brand (Taft, Tr. 1341–42). In fact, Acme did not purchase Golden Crown processed lemon juice in 1972 (Moreland, Tr. 1020–21). [109]

153. In May of 1973, Acme purchased, in two transactions, 2,500 cases of ReaLemon quarts for which it paid a net price of $3.65 per case, which was list price of $6.45 less a $2.80 per case deduction taken off invoice (CX 219, pp. 218–230). At the time the listed promotional allowance of ReaLemon was $1.80 off invoice, producing a net price of $4.65 per case (RX 561). This was the price paid by Acme's competitors, Frankford-Quaker and Penn Fruit (CX 218, p. 1; H. Greenberg, Tr. 1198–99).

154. In December 1973, Acme purchased 1,815 cases of ReaLemon quarts for which it paid $3.20 per case, which was list price of $6.45 per case less a $3.25 deduction taken off invoice (CX 219, pp. 288–293). The listed ReaLemon promotional deal at the time, however,

was only $1.00 per case off invoice plus $1.25 bill-back (CX 31), producing a total of $2.25 per case allowance received by Frankford-Quaker and Penn Fruit (CX 218, pp. 8-10; CX 312; H. Greenberg, Tr. 1200).

155. In the foregoing transactions, as the figures disclose, Acme received a lower price by $1.00 per case than Frankford-Quaker and Penn Fruit. As a result, not only were Acme's orders of ReaLemon very substantial, but the retail price of ReaLemon in Acme supermarkets in the Philadelphia area was lowered to 39¢ per quart in December 1973, which may well have eliminated the price spread between respondent's premium ReaLemon brand and competing brands, particularly Golden Crown, tending to hinder and restrict sale of the latter and tending to maintain or enhance ReaLemon's historic market dominance (see CX 4, p. 855, where respondent's 1974 Marketing Plan lists the average consumer cost of Golden Crown, quart size, in 1973 as 46¢ to 48¢). In a letter to its stores, in connection with the second transaction above, announcing a reduced price feature of 39¢ (from a regular price of 55¢) on ReaLemon quarts from [110] December 16 to December 25, 1973, Acme stated that it had been granted an allowance of $3.25 per case (the full amount of its deduction) off invoice for 4 weeks (CX 93). Acme, as noted, is the dominant supermarket chain in the Philadelphia area and the price leader.

156. In connection with the foregoing findings, respondent Borden contends that the $1.00 per case more than the listed allowance which Acme took off invoice in May and December 1973 purchases is due to deductions by Acme of accrued coop allowances. Borden's district sales manager in Philadelphia, Robert Sankey, testified that, with Borden's acquiescence, Acme took all its ReaLemon allowances off invoice, deducting accrued coop monies periodically "as they saw fit" (Sankey, Tr. 4732-33). Whatever the fact may be in this respect (see proposed findings of complaint counsel, Nos. 164 and 186, and respondent's reply memorandum at pp. A45-A51), Acme was allowed by ReaLemon Foods to deduct $1.00 per case off invoice which Frankford-Quaker and Penn Fruit were not, and such deductions by Acme were in direct contravention of Borden's established procedures for the cooperative advertising program. To receive cooperative advertising payments, certain specific promotional efforts had to be undertaken, and proof of performance submitted to Borden with a request for payment, as follows (CX 70; see also CX 74):

Completed Certificate of Performance, with copies of proof of performance (tear sheets, store bulletins, T.V. or radio script, window banner, handbill, mailing

material, etc. as applicable) must be submitted within 60 days after close of performance period. Certificate of Performance should be submitted to ReaLemon Foods by wholesalers, distributors, other direct buying customers and retailer [111] customers of non-participating wholesalers or distributors. ReaLemon reserves the right to refuse payment on all Certificates of Performance received 60 days after the end of the performance period.

In conformity with FTC Guide 13, ReaLemon Foods reserves the right to spot-check performance under this promotion. ReaLemon Foods will issue a check to the customer for promotional services rendered. *No deductions from remittances will be allowed.* ReaLemon Foods reserves the right to withdraw this offer at any time. Upon completion of performance, sign and submit ReaLemon Certificate of Performance along with proof of performance for payment under the terms of this offer to ReaLemon Foods, 1200 West 37th Street, Chicago, Illinois 60609. (Emphasis added.)

Other accounts in the Philadelphia area, such as Penn Fruit, in accordance with Borden's "Cooperative Merchandising Offer", received payments of coop money by check from ReaLemon after sending a request for payment accompanied by proof of performance (RX 364, 365). The record contains no evidence that Acme was ever required by Borden to justify its deduction with proof of performance.

157. Acme markets in Philadelphia purchased quarts of ReaLemon reconstituted lemon juice at $4.20-$4.25 a case or $2.25 off list price in the spring of 1974 when other retailers in the Philadelphia market received only $2.00 a case off list price (CX 219, pp. 321–330, 332–36, 338, 340, 344, 346, 349, 350; Leahy, Tr. 836; CX 101A; CX 312). The ReaLemon published promotion for District 14, which includes Philadelphia, offered only $2.00 off invoice on cases of 32-ounce ReaLemon [112] purchased between April 22 and May 17, 1974 (CX 33). The deal was announced to Borden's regional and district offices by Harold Saving, ReaLemon's National Sales director, on February 28, 1974 (CX 33).

158. On February 13, 1974, Borden salesman, J. J. McNulty, offered Acme an allowance of $2.25 per case on orders made between April 22 and May 10 (CX 219, p. 321). Subsequently, on March 12, 1974, McNulty made Acme another offer of $2.00 per case allowance off-invoice plus an additional 25 cents off invoice for the regular purchase dates of April 22 to May 17, 1974, with a suggested retail feature price to the public of 43 cents (CX 219, p. 322). Acme began deducting the $2.25 per case from invoices dated March 21. Between March 21 and May 21, Acme was invoiced for almost 16,000 cases of ReaLemon quarts of $2.25 off list price and 25 cents over deal price (CX 219, pp. 323–330, 332–36, 338, 340, 342, 344, 346, 349, 350).

159. Frankford-Quaker and Penn Fruit, as already indicated, two of Acme's competitors in the Philadelphia market (Vinocur, Tr.

2093-94), purchased ReaLemon at $2.00 off invoice (the regular allowance) during the spring of 1974 (CX 101A; CX 312). Frankford-Quaker purchased 3,080 cases at deal ($2.00 off) price (CX 101A). Penn Fruit was offered $2.00 off invoice on one order shipped before March 20 and $2.00 off invoice on purchases between April 8 and May 17, 1974, and purchased 550 cases in March and an additional 2750 during the deal period (CX 312).

160. Again, the preferential treatment accorded Acme resulted in the movement of a very substantial quantity of ReaLemon bottled lemon juice, 16,000 cases worth $67,000 or more, into the Philadelphia market and onto the shelves of the area's dominant supermarket chain. A reduced retail price of 43¢ per quart was [113] sought by ReaLemon, lower than the average retail of Golden Crown of 46¢ to 48¢ per quart in 1973, as noted earlier. The purpose and tendency to maintain ReaLemon's dominant market position is evident.

Buffalo

161. Niagara Frontier Services ("Niagara") owns or franchises Tops Markets, which is the largest volume supermarket in the Buffalo, New York area (Gerace, Tr. 1982; Springer, Tr. 1847). It purchased ReaLemon quarts at a total net cost of $4.40 per case from 1968 to 1972, and the price it paid never exceeded $4.45 until August 1974 (Gerace, Tr. 2061; CX 203-215). It paid a low price of $4.05 per case for ReaLemon quarts in December 1973 (CX 212). Niagara's grocery buyer testified that he bought ReaLemon quarts at the consistent price of about $4.40 per case during the entire period he was responsible for Niagara's grocery purchases, from 1968 to 1972 (Gerace, Tr. 1984, 1991-92, 2023-26, 2061). In 1973 and 1974 Niagara also purchased ReaLemon quarts around $4.45 per case, except for a purchase in August 1974 which was at $4.85 per case (CX 211-214). According to Niagara's grocery buyer, the competitive retail feature price of ReaLemon was 37 to 39 cents per quart in Niagara's Tops Markets, and a $4.40 per case wholesale price was necessary to sell at that price level (Gerace, Tr. 2023-24, 2026). The established price at which Niagara bought the product through May 1974 was $4.40 or $4.45, as stated, and the ReaLemon broker used off-invoice allowances, bill-backs and free goods to get the price down to that level (Gerace, Tr. 2023-24).

162. In contrast, the prices paid for ReaLemon quarts by the wholesaler, S. M. Flickinger Co., which supplied competing retail grocery firms in the Buffalo area, including Super Duper Markets, the second or third largest supermarket chain in Buffalo (Gerace, Tr. 1982; Springer, Tr. 1847), were consistently [114] higher, often by as

much as $1.00 or $1.50 per case except for one purchase in August 1974 (CX 204 through 214; CX 216).

163. In 1972, RealLemon offered Niagara a coop allowance of 60 cents per case on cases of RealLemon quarts purchased between January 1 and September 30 (CX 303, p. 24). Niagara, like Acme, was allowed by Borden to deduct this 60 cents per case off invoice throughout 1972, during which it purchased 5,500 cases (CX 204, 205, 210, 215).

164. The former Regional Sales Manager of RealLemon responsible for the Buffalo area testified that the 60 cents per case allowance to Niagara was "very similar to the Acme picture [in Philadelphia]" (Taft, Tr. 1313). He described the effect of this transaction with Niagara (Taft, Tr. 1313-14):

. . [Niagara] purchased this amount of course in sufficient volume to sustain them throughout, on this basis, an anticipated period of several months.

Q. As a result of this allowance did Niagara Frontier Services purchase unusually large quantities of RealLemon during the period in question?

A. The quantities were unusually large to be purchased in such a small period of time. Normally, the quantities would have been purchased over a longer period of time, had it not been for the allowance.

Q. Was the effect of this large purchase the same as you have noted with respect to the Acme situation? [115]

A. To the best of my knowledge and recollection, *there was no other competitive lemon juice sold by that concern called Niagara Frontier Services, at least, through October 1972.* (Emphasis added.)

As in the case of Acme, there was no explicit agreement between Niagara and RealLemon that the former would not purchase a competing brand of lemon juice in return for an extra allowance (Taft, Tr. 1342; Gerace, Tr. 2052). Taft explained his understanding of the situation as follows (Tr. 1342-43):

A. The situation between Acme and Niagara were similar, so whatever I actually stated with respect to Acme would apply there. It was our understanding or belief there were no agreements and nobody said, as a result of this promotion you cannot purchase any other lemon juice product — this was not done. This was done on a basis, assumption, that under this arrangement, with the purchases they would make, *they would not really be in a position to buy anything else.* It did not mean they couldn't. (Emphasis added.)

165. Buffalo, like Philadelphia, was a city in which RealLemon faced substantial competition from Golden Crown. As early as the 1971 Marketing Plan, it was noted that RealLemon's market share in

Buffalo had fallen from 100 percent to 81.3 percent during 1970 in the face of competition from Golden Crown (CX 1, p. 640). [116]

Miami

166. In early 1972 the ReaLemon broker in Miami and ReaLemon's Regional Sales Manager in charge of that area took steps to obtain commitments from retail food stores to reduce ReaLemon retail prices on quarts to 69 cents (CX 130, 131). ReaLemon's Regional Sales Manager wrote (CX 131):

> In talking to the buyers, it looks like we definitely will be getting a 69¢ retail *and we hope this will be one of the answers to eliminating some of our friends from the marketing.* (Emphasis added.)

167. At about the same time, in a transaction already described, the ReaLemon Regional Sales Manager referred to a Golden Crown "deal" with a large supermarket, Hills Bros., stating (CX 132):

> The Golden Crown deal with Hills Bros. I mentioned to your Dad on the phone this week. You may use some free goods (QUARTS) to work the Hills stores. Order these quarts and make sure the large stores have floor displays on our quarts. Work this out to the price [sic] is at 69¢ with the free goods. *If Golden Crown does not move at Hills, I am sure that Charley will not continue the deal until June 14th.* (Emphasis added.)

This action of ReaLemon plainly was for the purpose of preventing "movement" of Golden Crown in the Hills Bros. supermarkets by lowering the retail price of ReaLemon's premium brand. [117]

4. Sales were made at unreasonably low prices to combat competition

Complaint counsel have attempted to prove that Borden engaged in predatory conduct by selling ReaLemon's 32-ounce size to Acme markets in Philadelphia and to Niagara Frontier Services (Tops Markets) in Buffalo at prices below Borden's average variable costs for that product (see Dr. Mann, Tr. 494-98).

168. Costs of manufacturing a product can be divided into two types: fixed costs and variable costs. Variable costs are those which vary with the level of product or output, such as the costs of ingredients, containers, labels and labor incurred in producing the product, packing charges paid to third parties for supplying the labor for manufacturing a product, distribution or shipping costs, and that portion of selling expenses which varies with level of production or output (Dr. Mann, Tr. 905-906; Goluszka, Tr. 4453-54; Dr. Greenberg, Tr. 2791-93; Dr. Kamien, Tr. 5766). Average variable cost refers to the total of variable costs divided by the product output of a

firm over some period of time (Dr. Mann, Tr. 905; Dr. Greenberg, Tr. 2791). Short-run average variable costs are those costs incurred once the production unit of the plant is completed and ready to begin operations (Dr. Mann, Tr. 905).

169. Fixed costs are those costs which do not change within a relatively short period of time with the level of production or output (Dr. Kamien, Tr. 5766; Goluszka, Tr. 4453; Dr. Greenberg, Tr. 2791). Manufacturing overhead and administrative overhead are both fixed costs (Goluszka, Tr. 4454; Dr. Greenberg, Tr. 2792-93). To the extent that selling expenses include costs which do not vary with output or production, such as salaries to salesmen or the cost of their office space, they are fixed costs [118] (Goluszka, Tr. 4454; Dr. Greenberg, Tr. 4701). Promotional expenses which do not vary with output or production, such as point-of-sale material, are fixed costs (Goluszka, Tr. 4454).

170. Complaint counsel and respondent introduced into evidence differing computations of Borden's average variable costs of producing cases of ReaLemon quarts distributed in eastern markets supplied from ReaLemon's Minot and Comstock plants during 1971, 1972 and 1973. Complaint counsel's formulation (proposed finding 183, p. 100) is as follows: [119]

277-685 O—79——48

Average Variable Cost 12/32 oz. RealLemon Reconstituted Lemon Juice

Variable Costs	1971 Chicago	1971 Minot	1972 Chicago	1972 Minot	1973 Chicago	1973 Comstock
1) Ingredients	1.841	1.936	1.866	1.957	1.897	1.956
2) Container	1.080	1.079	1.116	1.051	1.103	1.104
3) Label	.077	.081	.077	.076	.093	.083
4) A. Labor	.085	-	.078	-	.106	-
B. Packing	-	.177	-	.180	-	.177
5) A. Distribution	.452	.452	.455	.455	.567	.567
B. Direct Ship	.175	.175	.188	.188	.408	.408
6) Selling	.37	.37	.37	.37	.31	.31
7) Advertising	.21	.21	.26	.26	.16	.16
Average Variable Cost:						
A. Distributed	4.12	4.31	4.22	4.39	4.32	4.36
B. Direct Shipment	3.84	4.03	3.96	4.12	4.16	4.20

(Source CX 293)

[120] 171. Complaint counsel's computations, as indicated in the chart, are based on CX 293, which shows a breakdown of the average total cost on a national basis of producing cases of 32-ounce ReaLemon reconstituted lemon juice for the years 1971, 1972 and 1973 at ReaLemon's Chicago plant and for its east coast co-packing operations (Goluszka, Tr. 4445-4452). During the years 1971 to 1973 Borden produced ReaLemon bottled lemon juice at its plant in Chicago, and had a co-packing arrangement with Minot Packing in Bridgeton, New Jersey, for production of ReaLemon in 1971, 1972 and the first part of 1973. During 1973 the co-packing operations were moved to Comstock Foods, a Division of Borden, in Waterloo, New York (Goluszka, Tr. 4446). The ReaLemon product sold in Buffalo and Philadelphia from 1971 through 1973 was produced at Minot or Comstock rather than in Chicago (Goluszka, Tr. 4452). Both parties have used the Minot/Comstock figures in their calculations of Borden's costs.

172. CX 293 was prepared from ReaLemon records for the use of ReaLemon executives by Mr. Ted Goluszka, Financial Manager of ReaLemon Foods. Mr. Goluszka was charged with responsibility for the accounting and data processing functions at ReaLemon, and records were maintained under his supervision which reflect the cost of manufacturing ReaLemon reconstituted lemon juice. These records were used to keep Melvin Peters, President of ReaLemon, informed of current costs of manufacture (Goluszka, Tr. 4443-45). The document was surrendered to complaint counsel pursuant to a request for such documents as would show an "estimate of the average total cost" of manufacturing ReaLemon (Tr. 4711), and purports only to list the "Average Annual Cost of 12/32 Oz. ReaLemon Reconstituted Lemon Juice" (CX 293). Complaint counsel prepared the accompanying chart by taking from CX 293 those items considered by Dr. Warren Greenberg, already mentioned, to be variable costs (Dr. Greenberg, Tr. 4693). [121]

173. Respondent Borden relies on RX 654, another document prepared by Mr. Goluszka (Goluszka, Tr. 4456), for its calculation of average variable cost. This document is also based on CX 293, with certain adjustments made to isolate variable costs from fixed costs (Goluszka 4454). Average variable costs as shown on RX 654 are as follows: [122]

Average Annual Variable Cost
12/32 Oz. ReaLemon Brand Reconstituted Lemon Juice

	1971 Minot		1972 Minot		1973 Constock	
	Buffalo	Philadelphia	Buffalo	Philadelphia	Buffalo	Philadelphia
Average Ingredients	1.936	1.936	1.957	1.957	1.956	1.956
Average Container	1.079	1.079	1.091	1.091	1.104	1.104
Average Label	.081	.081	.076	.076	.083	.083
Average Packing	.177	.177	.180	.180	.177	.177
Total Average Cost of Goods Sold	3.27	3.27	3.30	3.30	3.32	3.32
Distribution	.39	0	.40	0	.17	.25*
Average Selling Exp.	.31	.31	.32	.32	.26	.26
Average Annual Variable Cost	$3.97	3.58	4.02	3.62	$3.75	$3.83*

(RX 654)

*/ RX 654(a), p.2, which shows the underlying calculations on which RX 654 is based, shows the amount of "Distribution" cost in Philadelphia in 1973 to be $.248. Goluszka conceded that according to standard rounding procedures this entry should be .25 rather than .24 as was shown on RX 654. (Goluszka 5679, but see 5683-84). This item has been corrected; accordingly, the final figure for "Average Annual Variable Cost" has been changed to $3.83 rather than $3.82.

[123] 174. Borden's formulation of average variable cost differs from that of complaint counsel in three ways. First, Borden treated advertising as a fixed cost, whereas complaint counsel treated it as a variable cost. Dr. Greenberg testified that although there is some controversy among economists as to this issue, in his opinion advertising is a variable cost. He stated that in many cases, advertising expenditures will vary with a firm's output. At zero output advertising costs are usually zero, while the largest firms in an industry are generally the ones which advertise the most (Dr. Greenberg, Tr. 4712).

175. Citing for support a law review article, Areeda and Turner, "Predatory Practices under Section 2 of the Sherman Act," 88 Harv. L. Rev. 697 (1975), Dr. Greenberg stated that the method by which a company treats advertising on its books is an indication of whether advertising expenditures should be treated as a fixed or variable cost. Borden treats its advertising as an expense, rather than as an investment. Therefore, Dr. Greenberg stated, advertising should be treated as a variable cost in this case (Dr. Greenberg, Tr. 4713-14). Dr. Greenberg also cited economic literature which suggests that advertising is a variable cost, but in contexts other than a discussion of the components of average variable cost (Tr. 4694-97). However, he conceded that economists or accountants do not typically treat advertising as a variable cost (Tr. 4696).

176. Respondent Borden, on the other hand, treated advertising expenditures as a fixed cost (Goluszka, Tr. 4454). Dr. Morton Kamien, a Professor of Managerial Economics and an expert witness for respondent, testified that he considers advertising to be a fixed cost, and that his opinion is an accepted one among economists (Dr. Kamien, Tr. 5767). [124]

177. Borden's ReaLemon advertising expenditures are not in fact related, at least in the short-run, to the level of its output. Mr. Goluszka testified that the level of advertising for ReaLemon was set at the beginning of the year and maintained throughout the year regardless of the number of units produced during that period (Goluszka, Tr. 5662). Yearly expenditures for ReaLemon advertising increased in 1972 although production dropped, and decreased in 1973 while production increased (CX 288, CX 292).

178. In rebuttal to Dr. Greenberg's testimony about the possibility of treating advertising as an investment, John Dillon, a certified public accountant and Price, Waterhouse partner, testified that in his 15 years' experience he is not personally familiar with any company which treats advertising cost as anything other than an expense item, and that in his opinion it is proper only to expense

advertising in the year incurred, and not to defer or capitalize in any way advertising cost (Dillon, Tr. 4864). Dr. Greenberg himself stated that he knows of no company which treats advertising only as an investment (Tr. 4716–17).

179. Based on the foregoing, the undersigned finds that advertising was not a variable cost in the case of ReaLemon, and should not be included in a calculation of ReaLemon's average variable cost for production of its bottled lemon juice.

180. The second difference between Borden's formulation of average variable cost and that of complaint counsel is the following. Borden considered only a portion of the cost of average selling expense found in CX 293 in its calculation of average variable cost (Goluszka, Tr. 4456–58). Complaint counsel, based on Dr. Greenberg's testimony that he understood that the selling expense item [125] was composed solely of commissions paid to salesmen or brokers (Dr. Greenberg, Tr. 4700–4702), included the entire item in their calculation of average variable cost. However, Mr. Goluszka, who prepared CX 293, testified without contradiction that selling expense contains elements other than commissions, such as salesmen' salaries and their administrative costs (Goluszka, Tr. 5672–74). Dr. Greenberg admitted in his testimony that salary and administrative sales costs would constitute fixed costs which properly should be excluded from the average variable cost equation (Tr. 4701–4702). Borden's RX 654 eliminates these elements of fixed expense and contains only the variable expenses of commissions paid to brokers or salesmen (Goluszka, Tr. 5671–74; RX 654(a), p. 3). That figure is the one adopted in these findings.

181. Complaint counsel attack Mr. Goluszka's inclusion only of commissions paid to Borden salesmen in his calculation of 1973 selling expense (RX 654(a), p. 3). Mr. Goluszka testified that he did not know whether ReaLemon employed any brokers in that year (Goluszka, Tr. 5674), and complaint counsel point out that CX 79 shows ten brokers were retained by Borden for sale of ReaLemon reconstituted lemon juice. That exhibit, however, shows that no brokers were retained in Buffalo or Philadelphia, the cities in which below cost sales are alleged to have been made, or anywhere on the East Coast (CX 79). This discrepancy, therefore, does not cast substantial doubt on the accuracy of the selling expense figure contained in RX 654 as it pertains to the issues raised in this case.

182. The final area of disagreement between Borden and complaint counsel concerns the treatment of distribution costs. Complaint counsel used the distribution costs found in CX 293. Average distribution costs in that document were computed by

allocating total distribution and warehousing costs [126] against all ReaLemon product shipped throughout the country, to arrive at a "one weight" basis or standard figure which was then allocated to the 32-ounce equivalent product. Average "Direct Ship" is a subdivision of total distribution costs, which refers to shipments made directly to customers, bypassing the normal distribution system (Goluszka, Tr. 4449-50). For a reason not wholly clear from their findings, complaint counsel used a "direct shipment" cost for Acme and a "distributed" cost for Niagara in calculating the cost of supplying those accounts (compare complaint counsel's findings 186-87 with 183). Dr. Greenberg, on the contrary, indicated that he would use the "average direct ship" figure for sales in both Philadelphia and Buffalo (Tr. 4702-4704).

183. Borden, on the other hand, attempted to determine the actual distribution costs incurred in selling to Acme and Niagara, rather than using the average nationwide cost. Borden asserts in its proposed findings (No. 244) that products sold to Buffalo customers which purchased in large quantities, such as Niagara, were shipped in carload lots directly from the Minot or Comstock plant, while products sold to large customers in Philadelphia, such as Acme, were picked up by the customer while the Bridgeton plant was in operation, and thereafter shipped in carload lots from Comstock. RX 654, therefore, reflects as distribution costs the carrier rates for carload shipments to Buffalo from Comstock or Bridgeton and to Philadelphia from Comstock in 1973. Since, it is claimed, ReaLemon incurred no distribution costs when Philadelphia customers picked up at the Bridgeton plant, no rate is specified for those sales (Goluszka, Tr. 4457-58; RX 654(a), pp. 1, 2).

184. Mr. Goluszka testified that ReaLemon's average variable cost is usually computed from the total costs for all ReaLemon Foods plants nationally, rather than on a city-by-city basis (Goluszka, Tr. 5660-61), and freely conceded that his calculations [127] in RX 654 apply only to those companies taking delivery by the method assumed, and from the common carrier whose rates were used, in making the calculation (Goluszka, Tr. 5674-79). It is also clear from the record that ReaLemon did not consider its actual cost of serving Acme and Niagara at the time the sales in question were made. RX 654 was prepared solely for the purposes of this litigation (Goluszka, Tr. 4454-4460). Dr. Greenberg testified that in determining distribution costs for various customers it would be preferable to have information as precise as possible with regard to actual shipping costs rather than to rely on average shipping costs for all customers (Dr. Greenberg, Tr. 4709-4710). It is determined, therefore, that it is

proper for respondent Borden to attempt to isolate the variable cost of those sales made to particular customers which are alleged to have been below variable cost.

185. The cost estimates for Philadelphia which are contained in RX 654 apply only to a company picking up from the Bridgeton plant in 1971 or 1972, and taking delivery from Comstock in 1973 by the Todds Transport Company (Goluszka, Tr. 5692). The distribution costs for Buffalo found on RX 654 were computed using the full truckload rates of LoBiando Motor Express (Goluszka, Tr. 5678). However, the record does not establish that Acme and Niagara received all their deliveries in the manner assumed for the purpose of RX 654. A comparison of the invoices contained in the record with Borden's price lists (CX 37-54) shows that Acme received all its shipments of ReaLemon quarts recorded in the invoices from Minot at the FOB plant or ex-plant pickup price in 1971, 1972 and the first part of 1973 (see CX 219, pp. 1-216), and received a number of shipments in 1973 from Comstock at the price applicable to carload delivery (see CX 219, pp. 218, 225, 240, 252, 288, 295, 301, 305). Acme also received some shipments in 1973 [128] from Acme's warehouse in Hanover, Pennsylvania (CX 219, pp. 232, 244, 256, 263, 277; Sankey, Tr. 4811), and some deliveries at a charge for less than carload lots (CX 219, pp. 256, 263, 271). Mr. Goluszka testified that transportation costs for less than full truckloads are higher than full truckload rates (Goluszka, Tr. 5682-83), and that the cost of storing a finished product is a variable cost (Goluszka, Tr. 5666). However, neither of these costs is reflected in RX 654 (Goluszka, Tr. 5667, 5692). Thus, respondent Borden's variable cost figures for Acme are slightly understated for 1973.

186. The invoices contained in the record show that, in accordance with the assumptions underlying RX 654, Niagara bought ReaLemon reconstituted lemon juice from Minot in 1971 and 1972 at the list price for carload deliveries (CX 203-210). In 1973, however, one sale was made from Comstock at the delivered price (CX 211, 215). In one other instance Niagara received product from Comstock at the plant pick-up list price (CX 212). The invoices thus support the conclusion that the cost estimates for Niagara contained in RX 654 are generally reliable, and are perhaps slightly overstated for 1973.

187. In the opinion of the undersigned the evidence establishes that Borden did not sell its ReaLemon processed lemon juice at a price below average variable cost in Buffalo. The sale in that city alleged by complaint counsel to have been below average variable cost was one made to Niagara in December 1973 at a net price of $4.05 per case (CX 212; Gerace, Tr. 2011). However, Borden's 1973

average variable cost for that sale, according to RX 654, which has been found to be reasonably accurate, was $3.75, or 20 cents below the price paid by Niagara. Even if Borden's national average cost for direct shipment found in CX 293, 40.8 cents, is substituted for the distribution cost of 25 cents in RX 654, the average variable cost would be $3.99, or 6 cents below the price given to Niagara. [129]

188. The parties are not in agreement as to the lowest net price paid by Acme for ReaLemon quarts in 1973. Complaint counsel contend that Acme made a purchase in December 1973 at a net cost of $3.20 per case and two purchases in May of that year at a net cost of $3.65 per case (complaint counsel's proposed finding No. 186; CX 219, pp. 218-231, 288-293). Sales at these prices would be below even Borden's statement of its costs (RX 654). Acme deducted $2.80 from the invoice list price of $6.45 in the May transactions for a net payment of $3.65 per case, and deducted a total of $3.25 per case, including a $1.00 per case off-invoice promotional allowance, from the invoiced list price of $6.45 per case for a total net payment of $3.20 per case on the December transaction (CX 219, pp. 218-231, 288-293). As has been previously discussed, $1.00 per case of the deductions made by Acme in each of these transactions was claimed to be accrued coop allowances which were deducted in the aggregate, rather than a $1.00 per case price concession granted to Acme on these particular purchases.

189. It is clear from the record, as previously found, assuming the $1.00 deducted per case by Acme was accrued coop money, that such deduction was permitted by Borden although it violated the provisions of the cooperative merchandising program which required payments of coop funds to be made by check, after proof of performance was submitted, with no off-invoice deduction to be allowed (CX 70, 74, 94-100).

190. Accepting the $1.00 per case deducted by Acme in the foregoing transactions as accrued coop money, the lowest price paid by Acme in 1973 was $4.05 per case, or the list price of $6.45 less a $2.25 promotional allowance (see CX 31), less 15 cents per case cooperative advertising allowance. [130]

191. Borden's calculation of its variable cost of sales to Acme in 1973 was $3.83, or 22 cents below the lowest sale price. If one adds to that cost estimate the difference between Borden's national average cost of direct shipment from CX 293 and the distribution cost found in RX 654, the average variable cost is $3.99, or only 6 cents below the sale price to Acme of $4.05.

192. Complaint counsel do not allege any other sales below cost. In summary, in the opinion of the undersigned, the record does not

establish by a preponderance of the evidence that Borden sold ReaLemon processed lemon juice at a price lower than its average variable cost of producing that product.

193. The record does establish, however, that Borden sold lemon juice to Acme markets in Philadelphia and to Niagara Frontier Services (Tops Markets) in Buffalo at an extraordinarily low price. The lowest price which the record shows was given to another Philadelphia supermarket was $4.20, given to Frankford-Quaker (CX 218, pp. 6, 8, 9, 10). In Buffalo, the lowest price reflected in the record which Flickinger received in 1973 was also $4.20 (CX 216, pp. 13–16). The $4.05 per case price is close to ReaLemon's National average per case cost on a direct shipment basis. This cost appears to have been the only data available to Borden management at the time the subject sales were made. As previously stated, ReaLemon's financial manager, Mr. Goluszka, testified that he generally computed the company's average costs using nationwide data from all ReaLemon plants (Goluszka, Tr. 5660–61). Thus, at the time of the sales in question, Borden either failed to consider its cost before agreeing to the low sale prices, or knew that it was selling very close to the cost figures reflected in the data that was then available to it. [131]

194. As has previously been described and found, ReaLemon commands a price premium over other brands of processed lemon juice. Nielsen data for 1973 indicated that ReaLemon sold for 10 to 21 cents more than Golden Crown in the 32-ounce size in Eastern and North Central area markets (CX 4, p. 873). The ReaLemon Foods president stated in ReaLemon's 1972 Marketing Plan, as also described earlier, that in a "completely unique situation" ReaLemon lemon juice commanded a premium of 25 to 30 cents per unit over competitive brands (CX 2, p. 665).

195. ReaLemon received from its brokers and employees competitive information with regard to Golden Crown promotional levels (CX 81), and attempted to analyze Golden Crown's cost structure. In 1972 ReaLemon estimated that Golden Crown's cost of goods alone (including a 20 percent reduction in the cost of ingredients for suspected adulteration)[3] was $2.83 (CX 3, p. 762). Adding the cost of distribution, selling and overhead, ReaLemon's estimate of Golden

[3] In fact, Golden Crown's reconstituted lemon juice was adulterated with citric acid and sugar, and respondent Borden's suspicions in this respect were well founded. The evidence proves beyond question that Golden Crown routinely, at least during significant production periods, manufactured its reconstituted lemon juice using substantial amounts of citric acid and sugar, and the undersigned so finds. See the testimony of Scotellaro, Tr. 3539–3705 and Bello, Tr. 3740–3784, and RX 12, pp. 1 through 56, RX 13, pp. 1 through 19, RX 549, pp. 1–2; see also respondent's proposed findings 7 through 14, pp. 11 through 15, which are accurate on this issue. Scotellaro and Bello were former workers in the Golden Crown plant. Their testimony was thoroughly credible, and was backed up by completely convincing documentary evidence. There was no disclosure, it may be noted, on the Golden Crown labels of the presence of sugar and citric acid.

Crown's cost was $3.74 (CX 3, p. 762). Paul Hansfield, Golden Crown's president, estimated in late 1973 or early 1974 that its costs were $3.11 before freight and selling expenses, and approximately $4.00 including those items (CX 145; Hansfield, Tr. 137-143). ReaLemon's estimate of Golden Crown's costs were thus relatively accurate. [132]

196. Like any other marketer Golden Crown had to provide a satisfactory retailer markup in order to secure distribution, shelf space, display and feature activity. According to ReaLemon's sources, the markup was 20 percent to 30 percent in 1972 and 1973 (CX 3, p. 763; CX 4, p. 855). In the words of former ReaLemon's broker, Alan Wrisley, "[t]here is only one reason why a retailer would want to stock another brand [in addition to ReaLemon] . . . [t]hat would be because he could make more gross margin dollars by stocking it . . ." (Wrisley, Tr. 2181). Golden Crown also expected retailers to make a 20 to 22 percent markup (Hansfield, Tr. 158).

197. As its Marketing Plans and other internal documentation establish, ReaLemon determined to maintain its dominant market share and remain the featured brand of bottled lemon juice at the retail level because it considered this factor to be the best way to restrict the growth of competition (CX 2, p. 679). As has already been recounted, ReaLemon throughout the years 1971 and 1974 used price promotions to reduce the price spread between it and competing brands (CX 1, p. 656; CX 2, pp. 677, 700; CX 3, pp. 788, 792; CX 4, p. 873). For example, in the fall of 1973 ReaLemon initiated promotional allowances of $2.25 per case in the Northeastern United States and Chicago (CX 4, p. 894; CX 31). The ReaLemon representative suggested to Acme markets that with a $2.25 promotional allowance it should feature ReaLemon quarts at a retail price of 39 cents (CX 219, p. 274). As discussed, Acme deducted an additional dollar off invoice, which Borden ratified, for a total of $3.25 off invoice, and did price ReaLemon at a 39-cent retail, a 16-cent reduction from its regular price (CX 93). [133]

198. ReaLemon's former Philadelphia broker observed that to compete with ReaLemon another brand of reconstituted lemon juice needed to be 10 to 15 cents per quart cheaper at retail and "would still have hard sledding" (Vinocur, Tr. 2105-2106). For Golden Crown to maintain even a 10 cent retail price differential, and for the retailer to maintain a 20 percent markup, Golden Crown would have had to have been purchased at $2.90 per case by Acme. That would have been 84 cents under ReaLemon's estimate of Golden Crown's cost and $1.10 under Golden Crown's cost, as stated by Mr. Hansfield.

199. In Buffalo, the continuous $4.40 per case price received by Niagara (Tops Markets) in 1971 and 1972 allowed it to feature ReaLemon at 37 to 39 cents per quart (CX 203-210, CX 215; Gerace, Tr. 2025). For a retailer selling ReaLemon at 39 cents per quart to maintain a Golden Crown price differential of 15 cents, he would have to sell Golden Crown for 24 cents a bottle. If he were going to maintain the margin that made it profitable to purchase a second brand, this would mean (using a 20 percent markup figure) that he would have to be able to purchase Golden Crown at $2.40 per case. If he priced Golden Crown only 10 cents under ReaLemon, at 29 cents, he would have to be able to purchase Golden Crown at $2.90 per case. Even if he priced Golden Crown at only five cents under ReaLemon at 34 cents, probably far less than the differential needed to cause purchasers to abandon the premium ReaLemon brand for a relatively unknown new entrant, he would have to be able to purchase Golden Crown at $3.40. ReaLemon's $4.05 price to Niagara in December of 1973 would have required an even lower Golden Crown cost, assuming the same margin and price differential (CX 212). [134]

200. In sum, respondent Borden priced its ReaLemon lemon juice so low in the foregoing transactions in Philadelphia and Buffalo that competing brands, such as Golden Crown, could not market their brands without selling near, at, or even below cost. The fact that Golden Crown, a new entrant, in attempting to break into the market may have been the first to offer bottled lemon juice at extremely low or below cost prices (see, for example, RX 175 and, for additional instances, Borden's proposed finding 203) did not justify, in the opinion of the undersigned, Borden's pricing practices. It is obvious from the record of this proceeding that Golden Crown, or any other new entrant in the marketing of bottled lemon juice, had only one way of breaking into the market in the face of the consumer acceptance of the ReaLemon brand, and that was price.

201. What cannot be overlooked is that Borden possessed a monopoly share of the bottled lemon juice market, and was the beneficiary of a barrier to entry in the form of the "consumer franchise" conferred by the ReaLemon brand. To permit Borden to price ReaLemon at or near cost as a competitive weapon to combat a new entrant, on the ground that such new entrant, using the only means available to it for breaking into the market, itself priced at or near cost, would allow Borden free reign to maintain its monopoly position and restrict new entry.

5. Borden maintained its monopoly position

202. ReaLemon was successful in maintaining its monopoly position, both nationally and in most metropolitan markets. In 1974, as previously described, ReaLemon's nationwide volume share of the processed lemon juice market was 75.3 percent compared with [135] Golden Crown's 14.9 percent.[4] Two other companies in the market had shares of only 1.4 percent each. ReaLemon's 1974 dollar share was even higher: 77.8 percent compared to 10.6 percent for Golden Crown and 1.9 percent and 2.9 percent for other companies in the industry (CX 239). As has been previously stated, ReaLemon's market share in many metropolitan areas was much higher than its national share, and in many large cities ReaLemon's market share continued in excess of 90 percent (see CX 258). According to complaint counsel's tabulations, in early 1974 ReaLemon had 90 percent or more of the bottled lemon juice business (equivalent case sales) in Seattle/Takoma, San Francisco, Minneapolis/St. Paul, Memphis/Little Rock, Kansas City, Houston, and Cincinnati/Dayton/Columbus, 85 percent or more in St. Louis, Indianapolis, Pittsburgh, New Orleans, and Miami, 80 percent or more in New York, Phoenix/Tucson, Dallas/Ft. Worth, and Birmingham/Montgomery, and 75 percent or more in Atlanta, Baltimore/Washington, Chicago, Cleveland and Syracuse (CX 258). In only one metropolitan area, Los Angeles, out of all the major cities in the United States, according to complaint counsel's tabulation, did the ReaLemon share of the bottled lemon juice business in 1974 fall below 60 percent, and in only two, Denver and Buffalo, did it fall below 70 percent (CX 258). Dollar share figures were even higher (CX 258). According to respondent's own marketing plan for 1974, in Atlanta, Birmingham, Baltimore/Washington, Cincinnati, Cleveland, Houston, Indianapolis, Kansas City, Memphis/Little Rock, Minneapolis/St. Paul, New Orleans, New York City, Pittsburgh, Seattle/Takoma, St. Louis and San Francisco, containing almost 40 million people, ReaLemon had over 75 percent of the reconstituted lemon juice business, and in a substantial number of these Cities ReaLemon's market share ranged upwards of 80 percent (CX 4, p. 883). [136]

203. Although ReaLemon declined from control of 90 percent or more of the processed lemon juice business nationally to around 75 percent in 1975 (according to respondent's own figures, RX 669), the latter, under the circumstances disclosed by this record, remains a monopoly share. And as described in the preceding finding, respondent's control of the processed lemon juice business in the

[4] ReaLemon's "equivalent case" share of the processed lemon juice market was 74.7 percent in 1975, while Golden Crown had a 15.2 percent share (RX 669).

bulk of the nation's urban markets remained at monopoly levels of 70 percent or more, even if there were declines in some cities by September 1975, that is, to 68 percent in Buffalo, to 67.5 percent in Philadelphia (RX 669). In short, respondent succeeded in maintaining its monopoly position in the nation overall, and in most of the nation's metropolitan areas.

204. Furthermore, ReaLemon itself recognized that checking Golden Crown's growth in those areas where it was making a substantial effort to enter the market was likely to significantly impair its ability to expand into new markets (CX 4, p. 864). Thus, even though ReaLemon lost some of its market share in some cities, it can be concluded that its efforts against Golden Crown in those cities contributed to its ability to maintain its historic monopoly position in other areas.

III

Legal and Factual Issues

Relevant Product Market

As stated at the beginning of this decision, a paramount issue in this proceeding concerns proper definition of the relevant product market. Respondent Borden has contended from the start that fresh lemons and processed lemon juice compete for the same end [137] uses among the consuming public, and consequently are in the same relevant market. Complex and extensive economic testimony was presented by Borden on this issue through Doctors Massy and Kamien, particularly the former. See respondent's proposed findings, pp. 34–60, reply memorandum, pp. 9–45.

Based upon data relating to consumer use of fresh lemons and commercial (bottled) lemon juice developed by a menu census conducted by the Market Research Corporation of America, Dr. Massy concluded there was reasonable interchangeability of end uses for both products, that no demographic or socioeconomic factors prevented any significant number of persons from using either fresh lemons or processed lemon juice, and that substitution was taking place among consumers (see respondent's proposed findings, p. 43). In short, there was a "similarity of uses of the products." Dr. Kamien examined the results of Dr. Massy's study and saw no evidence that fresh lemons and processed lemon juice should be in separate submarkets (Dr. Kamien, Tr. 5753–5756). Dr. Massy further calculated elasticity of substitution, cross-elasticity of demand, and the ratio between "own price elasticity and cross-elasticity." He concluded

that there was a significant relationship between the prices of fresh lemons and processed lemon juice, and the sales volume of the products, and a high degree of competition between processed lemon juice and fresh lemons (see respondent's proposed findings, pp. 48-60).

Complaint counsel vigorously dispute Dr. Massy's conclusions. They deny his view that potential interchangeability of use is adequate to define a relevant market, and deny that the prices of fresh lemons and processed lemon juice are interrelated. On the contrary, complaint counsel assert that fresh [138] lemons and bottled lemon juice are priced independently of each other. Complaint counsel attack Dr. Massy's interpretation of the menu census data of the Market Research Corporation of America as arbitrary, and attack Dr. Massy's conclusions from his elasticity of substitution and cross-elasticity of demand studies. Complaint counsel contend, among other things, that there are substantial data problems in the material underlying Dr. Massy's work "which make the results of Dr. Massy's regressions [econometric equations] unreliable."

More particularly, complaint counsel question Dr. Massy's elasticity of substitution model, which respondent asserts demonstrates a relationship between the relative prices of fresh lemons and processed lemon juice and the relative sales volumes of the products. Complaint counsel question this study of Dr. Massy on the ground that in order to compute a cross-price elasticity from an elasticity of substitution, the "own-price elasticity" of the product must be known (Dr. Massy, Tr. 5204). Inasmuch as Dr. Massy did not know the own-price elasticity of either fresh lemons or bottled lemon juice, he was compelled to use a "surrogate," and used the own-price elasticity of sugar. Complaint counsel characterize this as "pure speculation," pointing out that greatly different results would have been obtained in Dr. Massy's regressions had he used oranges or shortening. Depending on the surrogate used, the results of Dr. Massy's calculations would have variously shown fresh lemons and bottled lemon juice to have been complements, weak substitutes, or independent and unrelated to each other.

Dr. Kaplan, an expert economist, pointed out the deficiencies in Dr. Massy's methodology for attempting to define the relevant product market by means of an elasticity of substitution measure, particularly without knowing "own-price elasticity" (Tr. 6026-28): [139]

Q. Dr. Kaplan, on the basis of the four exhibits that you have described and the methodology employed by Dr. Massy, what is your professional opinion of the use of the elasticity of substitution in defining the relevant market in this case?

A. Well, initially, elasticity of substitution has a problem because you need to know your own price elasticity, but even ignoring that problem, it seems that we have gotten an array of possible elasticity of substitution going from minus .92 all the way to a positive .4190 using a variety of plausible model specifications, plausible data definitions in cases of a time trend which seem plausible as well and, therefore, we have got just a morass of different numbers and, therefore, it seems difficult to be able to single out any particular one of these with any confidence and point to that one and say this is what, indeed, the elasticity of substitution is.

In fact, these numbers, assuming that the own-price elasticity is consistent with these goods, one [sic] complements independent or weak substitutes I don't think particularly, they are consistent with their being strong substitutes, however.

This is not to suggest that I think that it is plausible, that they are complements, but the fact of the matter is that in defining statistical procedures and in analyzing these things, [140] you must be able to differentiate between various relationships, and this particular methodology and the procedures employed, just don't allow you to do that.

Q. What is your professional opinion, Dr. Kaplan, of using elasticity of substitution in defining a relevant market?

A. Again, as I have indicated time and time again, that without own-price elasticity of the product involved, its usefulness is very limited.

Q. Suppose, for a moment, Dr. Kaplan, that two consumer goods had an estimate of elasticity of substitution of negative .9. Could you conclude that these two goods are complements and have no relationship at all or weak substitutes?

A. Yes, you could conclude any of those.

Q. What is the reason that this number is consistent with all these possible results?

A. Again, depending on what the own-price elasticity is, all those results are possible.

Q. Could you give an example why this is true?

A. I think I indicated earlier, if you have the price and quantity of one variable remaining constant through the period though there are price changes with respect to the other item and there is, since it has own-price elasticity, there are quantity changes, you would estimate in that case [141] an elasticity of substitution and if, for instance, own-price elasticity was minus .9, which is not an excessively large number and perfectly plausible, you would come up with an elasticity substitution of minus .9 and clearly, there is no interdependence between the price of one good and the quantity of demand of another.

Serious uncertainties thus underlie Dr. Massy's calculations purporting to show a relationship between the prices of fresh lemons and processed lemon juice and the sales volume of the products.

In contrast, the record in this proceeding establishes substantial retail price differences to exist, and to have existed over the years, between fresh lemons, that is, the juice in them on a per ounce basis, and bottled lemon juice (see findings 25 through 29). The record also

establishes that bottled lemon juice was priced independently of fresh lemons, and fresh lemons were priced independently of bottled lemon juice. Neither fluctuated in response to price changes of the other at the wholesale or retail level.

The undersigned thus cannot accept Dr. Massy's testimony and calculations if he is suggesting the existence of price sensitivity between fresh lemons and bottled lemon juice. Such does not exist, as the record discloses. Of course, at some point price differentials, if large enough, may cause some segments of the public to shift from virtually any product to a substitute, if there is a substitute. Cf. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 574 (1966). The record here does not establish that consumers in day-to-day supermarket purchases switched between fresh lemons and bottled lemon juice [142] in response to changes in the prices of the two products. On the contrary, as stated in the findings, the two continued side-by-side in the market-place notwithstanding the fact that, as a ReaLemon advertising brochure to the trade publicized, one could obtain for 2.8¢ the same amount of ReaLemon lemon juice as one would have had to pay 12.3¢ for in the form of a fresh lemon, about one-fourth as much.

Turning to the question of standards for market definition, the principles applicable to determination of "line of commerce" under Section 7 of the Clayton Act are clearly applicable to determination of relevant product market under monopoly charges. *United States* v. *Grinnell Corp., supra*, 384 U.S. at 573; *L. G. Balfour Co.*, 74 F.T.C. 345, 497 (1968), *aff'd in part, rev'd in part, L. G. Balfour Co.* v. *Federal Trade Commission*, 442 F.2d 1, 9–11 (7th Cir. 1971); *United Fruit Co.*, 82 F.T.C. 53, 149 (1973), *rev'd in part and aff'd in part, Harbor Banana Distributors, Inc.* v. *Federal Trade Commission*, 499 F.2d 395 (5th Cir. 1974). See also *Columbia Broadcasting System, Inc.* v. *Federal Trade Commission*, 414 F.2d 974, 978–79 (7th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970).

As already stated, the undersigned has no doubt that processed lemon juice constitutes, at the least, a valid submarket for antitrust purposes. The fact is that fresh lemons and processed lemon juice are very different products, as the findings herein disclose. Bottled reconstituted lemon juice simply does not taste as good as juice from fresh lemons. Indeed, the difference between the taste of the two products seemingly is severe (findings 18 and 19). Bottled lemon juice contains additives which are objectionable to much of the public (finding 24). The study done by the Center For Advanced Marketing Practice reported comments of persons interviewed on [143] this score (CX 286, pp. 7673–74). One illustrates the point: "Most bottled

things have chemicals added to it [sic] and you pick that up, the chemical taste." See also the comments of ReaLemon Foods' president in the 1972 Marketing Plan (CX 2, p. 674). There are many other economically important differences (findings 10 through 17, and 20 through 23). Not to be ignored, furthermore, is the fact that there are important uses for which processed lemon juice cannot be substituted for fresh lemons, for example, as a garnish in serving food, a lemon wedge in a glass of iced tea, lemon peel in a beverage.

Even if there is a degree of interchangeability, however, and some substitution actually takes place as Dr. Massy maintains, there is a serious loss of utility, for example, accepting poor taste and additives if bottled lemon juice is used instead of fresh lemons, and a great loss of convenience, risk of spoilage and much higher cost if fresh lemons are purchased instead. Ignoring these factors, and recognizing that fresh lemons and processed lemon juice are used for many of the same purposes by the public, does not dictate that they must be placed in the same product market where serious, important and economically substantial distinguishing characteristics differentiate the products, as in this case. The same consideration applies to the many examples of lemon flavored and lemon based products introduced in evidence by respondent (RX 382). See *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 275 (1964) (insulated aluminum conductor considered a separate market although competition with copper conductor would also have permitted grouping into a single product market); *Union Carbide Corp.*, 59 F.T.C. 614, 655 (1961) (competition between polyethylene film and other flexible packaging materials, yet former held to constitute separate lines of commerce); *United States* v. *Lever Bros. Co.*, 216 F. Supp. 887, 891 (S.D.N.Y. 1963) (direct competition between low sudsing [144] detergents and high sudsing detergents, yet placed in separate lines of commerce); *United States* v. *Aluminum Co. of America*, 233 F. Supp. 718 (E.D. Mo. 1964), *aff'd per curiam*, 382 U.S. 12 (1965) (separate market for aluminum curtain wall, notwithstanding competition with other types of building materials for same use).

The most comprehensive statement of the criteria for market definition is contained in *Brown Shoe* v. *United States*, 370 U.S. 294, 325 (1962). It was there established that although the outer boundaries of a product market may be determined by reasonable interchangeability of use or cross-elasticity of demand between a product and substitutes for it, well-defined submarkets may exist within the broad market which in themselves constitute product markets for antitrust purposes. Among the factors enumerated by *Brown Shoe* are (370 U.S. at 325):

. . . industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

A consideration of these factors compels the conclusion that processed lemon juice constitutes a separate submarket.

Processed lemon juice producers recognized the production, marketing and sale of that product as a separate business (findings 36 through 64). See also *L. G. Balfour, supra*, 74 F.T.C. at 497; *Reynolds Metals Co.* v. *Federal Trade Commission*, 309 F.2d 223, 227 (D.C. Cir. 1962); *General Foods Corp.*, 69 F.T.C. 380, 412 (1966), *aff'd*, 386 F.2d 936, 941 (3rd Cir. 1967), *cert. denied*, 391 U.S. 919 (1968); *Columbia Broadcasting System, Inc.*, 72 F.T.C. 27, 325 (1967), [145] *aff'd in part, rev'd in part and remanded, Columbia Broadcasting System, Inc.* v. *Federal Trade Commission, supra*, 414 F.2d at 978–79.

The prices of fresh lemons and processed lemon juice were completely distinct, as already stated, and fresh lemons cost around four and one-half times as much per ounce of juice as bottled lemon juice (see *e.g.*, RX 546, p. 6, and findings 25 through 27). Comparable differentials have prevailed over the years, and as noted earlier, the differential between juice from fresh lemons and non-premium brands of bottled lemon juice was even greater since such brands had to have a lower retail price to compete with the dominant ReaLemon brand (see finding 82). Although the price differences between ReaLemon lemon juice and competing brands reflected artificial differentiation due to brand acceptance, length of time in the market, etc. (see CX 2, p. 673, where ReaLemon Foods' president states "Processed lemon juice is processed lemon juice"), the price differences between bottled lemon juice and fresh lemons reflected genuine and actual product differences. As stated, fresh lemons have not been driven from the market notwithstanding their greatly higher cost, but continue to have a sales volume many times greater than processed lemon juice. The distinct and substantial price differences prevailing between fresh lemons per ounce of juice and bottled lemon juice, as stated earlier, are strong evidence that they inhabit separate markets. See, in addition to *Brown Shoe, United States* v. *Aluminum Co. of America, supra*, 377 U.S. at 276; *Reynolds Metals* v. *Federal Trade Commission, supra*, 309 F.2d at 229; *Avnet, Inc.*, 82 F.T.C. 391, 450–51 (1973), *aff'd, Avnet, Inc.* v. *Federal Trade Commission*, 511 F.2d 70, 77 (7th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3202 (October 6, 1975); *Litton Industries, Inc.*, 82 F.T.C. 793, 997 (1973). [146]

In the day-to-day retail grocery trade, as also stated earlier, the record discloses little or no sensitivity between the prices of fresh

lemons and the prices of the various sized bottles or plastic containers of processed lemon juice. Fresh lemon prices fluctuate on a weekly and even a daily basis whereas the price of processed lemon juice changes at infrequent intervals (finding 28). Processed lemon juice marketers priced their product to compete with other processed lemon juice brands, not fresh lemons (findings 30 through 33). Retail food store buyers purchased processed lemon juice without considering the price of fresh lemons, and produce buyers stocked fresh lemons without consulting the price of processed lemon juice (findings 34 and 35). There is no evidence that when the price of fresh lemons rose or fell in the produce departments of retail food stores the prices of processed lemon juice were remarked or changed to be competitive, or that the public switched back and forth as prices of fresh lemons fluctuated. The retail price of respondent's ReaLemon lemon juice was determined primarily by the promotional allowances per case prevalent or offered by respondent from time to time (see CX 1, pp. 650, 656-57; CX 2, p. 716; CX 3, p. 781; CX 4, p. 873).

In fact, respondent offered higher promotional allowances in "highly competitive" markets than it did in "low competitive" markets, completely inconsistent with day-to-day, direct price sensitivity with fresh lemons (findings 30 through 32). The lack of sensitivity between fresh lemon prices and processed lemon juice prices is a most significant factor indicating the existence of those products in separate product markets or submarkets. See in addition to *Brown Shoe, General Foods Corp.* v. *Federal Trade Commission, supra*, 386 F.2d at 942. [147]

Processed bottled lemon juice has a variety of distinct and unique characteristics which strongly differentiate it from fresh lemons, and by the same token obviously fresh lemons have unique characteristics differentiating them from bottled lemon juice (findings 10 through 24). Convenience, economy, presence of additives, shelf-life and spoilage are economically highly significant, as emphasized already, and distinguish processed lemon juice from fresh lemons for purposes of market definition. See in addition to *Brown Shoe, United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593, (1957); *General Foods Corp., supra*, 69 F.T.C. at 414-15, *aff'd. General Foods Corp.* v. *Federal Trade Commission, supra*, 386 F.2d at 941-42; *Union Carbide Corp., supra*, 59 F.T.C. at 655; *United States* v. *Aluminum Co. of America, supra*, 233 F. Supp. at 725. It is clear from the record that one or more of these characteristics was sufficient to cause segments of the public to purchase processed lemon juice, and others to buy only fresh lemons. For members of the public who want the taste of

fresh lemons or the appearance of a lemon wedge or peel, or who refuse to ingest chemical additives, there is no reasonable interchangeability in use or cross-elasticity of demand. Likewise, for segments of the public who demand convenience or economy, or immediate availability without the trouble and mess of squeezing lemons, or who refuse to accept spoilage in the refrigerator, there was no reasonable interchangeability of cross-elasticity of demand.

Further indications that fresh lemons and processed lemon juice are properly components of separate markets or submarkets is the fact that each is marketed through specialized vendors, and each is produced in distinct and unique facilities. Fresh lemons are marketed as fresh produce, whereas processed bottled lemon juice is sold as a grocery product through brokers or, since 1973 in the case of respondent's ReaLemon, by the Borden sales organization (findings 65 and 66). Worth noting, furthermore, is [148] the fact that fresh lemons are purchased by the produce buyers of supermarkets and sold in the produce departments along with oranges, grapefruit, fresh vegetables, lettuce, etc. Bottled lemon juice, except for the small lemon-shaped and colored squeeze bottle, is purchased by grocery buyers and sold in the supermarket grocery departments (finding 67).

Fresh lemons and processed lemon juice, of course, have wholly different production facilities (finding 68). There is obviously no ability on the part of a processed lemon juice plant to produce fresh lemons, or fresh lemon producers to produce processed lemon juice without constructing a plant. In other words, there was no elasticity of production facilities. *Brown Shoe, supra*, 370 U.S. at 325, n. 42; *Liggett & Myers*, Docket No. 8938, final order of April 29, 1976.

The significance of any one of the foregoing factors may be debated, but combined they certainly establish, in the opinion of the undersigned, distinct markets for fresh lemons and processed lemon juice rather than the converse. *United Fruit Co., supra*, 82 F.T.C. at 148, *aff'd. Harbor Banana Distributors, Inc.* v. *Federal Trade Commission, supra* (specialized vendors); *United States* v. *Aluminum Co. of America, supra*, 233 F. Supp. at 725 (specialized vendors); *Budd Company*, CCH *Trade Reg. Rep.*, ¶20998 (F.T.C. 1975) (distinct production facilities); *General Foods, supra*, 69 F.T.C. at 417, *aff'd. General Foods Corp.* v. *Federal Trade Commission, supra*, 386 F.2d at 943 (distinct production facilities). There has been no mechanical counting of the indicia enumerated in *Brown Shoe*. The distinguishing characteristics between fresh lemons and processed lemon juice are of substantial economic significance, and dictate beyond question, in the opinion of the undersigned, the placing of processed

lemon juice in a separate market or submarket from fresh lemons. [149]

Comment is warranted upon the so-called *Cellophane* case, *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956), and the glass/metal container case, *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964), upon which respondent places considerable reliance in arguing for the inclusion of fresh lemons and processed lemon juice in the same market. The qualifications added to the market delineation principles of the *Cellophane* case by the subsequent *Brown Shoe* decision were set out by now Chief Justice Burger in his decision in *Reynolds Metals, supra*, 309 F.2d at 226:

> . . .in the [Brown Shoe case], the concepts of interchangeability of use and cross-elasticity of demand underwent certain important qualifications and development. It is now clear that mere potential interchangeability or cross-elasticity may be insufficient to mark the legally pertinent limits of a "relevant line of commerce." The "outer limits" of a general market may be thus determined, but sharply distinct submarkets can exist within these outer limits which may henceforth be the focal point of administrative and judicial inquiry under Section 7.

Similarly, the Supreme Court found a broad market in assessing the merger of two major companies, Continental Can Co., the nation's second largest producer of metal containers and Hazel-Atlas Glass Company, the third largest producer of glass containers, but this did not imply that separate submarkets did not also exist. In *General Foods, supra*, the Commission recognized this fact (69 F.T.C. at 411): [150]

> In *Continental Can*, the Court was confronted with just the reverse of the situation in *Alcoa*. In *Continental Can*, the acquiring company, Continental, produced metal containers and the acquired company produced glass containers. Thus, the issue before the Court was whether a broader market encompassing both products was meaningful; the Court was not concerned with the question as to whether a more limited product market also existed. The Court held that metal and glass containers were in the same product market for the purposes of considering the effects of the acquisition, *even though the Court considered the products of the two companies to be in "separate industries" and to comprise distinct "product markets."* The market defined by the Court in *Continental Can* was that delimited by the "outer boundaries" referred to in the *Brown Shoe* opinion; but *the Court took pains to point out that its finding with respect to this broader market did not preclude the finding of narrower submarkets within the more comprehensive* market. . . . (Emphasis added.)

See also *Liggett & Myers, supra*, where the finding of a broad market did not imply that valid submarkets within a broad dog food market did not exist. As noted at the beginning of this section, the principles of *Brown Shoe* are not limited to Section 7, but apply fully to monopoly charges whether under Section 2 of the Sherman Act or Section 5 of the Federal Trade Commission Act.

Monopoly Power

As the findings establish, respondent Borden possessed monopoly power in the processed lemon juice industry, having the power to control prices and to [151] exclude competition. The acceptance of the ReaLemon brand in the marketplace was such that it was virtually synonymous with bottled lemon juice itself, and commanded a premium price. Competing brands could only maintain sales through a substantial differential between their retail price and the price of ReaLemon. By lowering the price of ReaLemon respondent had the power to force down the price of competing brands and ultimately to force them off the shelves of the nation's supermarkets and retail food stores (findings 81 through 87, and 95 through 100).

Monopoly power has long been defined as the power to control prices or unreasonably restrict competition. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 811 (1946); *United States* v. *E. I. du Pont & Co., supra*, 351 U.S. at 391; *United States* v. *Griffith*, 334 U.S. 100, 107 (1948). ReaLemon Foods at all relevant times shown by this record had between 90 percent and 75 percent of the national market for processed lemon juice, and comparable market shares in a large number of major metropolitan areas (findings 75 through 78).

The existence of monopoly power may be inferred from a predominant share of the market. *United States* v. *Grinnell, supra*, 384 U.S. at 571. Whatever may be the threshold market share permitting an inference of monopoly power, see Judge Hand's dictum in *United States* v. *Aluminum Co. of America (Alcoa)*, 148 F.2d 416, 424 (2nd Cir. 1945), in the opinion of the undersigned, respondent far exceeded it in this case.

It is unnecessary, however, to ground the finding that respondent possessed monopoly power in the processed lemon juice industry solely upon ReaLemon's predominant market share, although in the opinion of the undersigned the facts would justify that result. [152] *United States* v. *Grinnell, supra*, 384 U.S. at 571; *Cliff Food Stores Inc.* v. *Kroger, Inc.*, 417 F.2d 203, 207 n. 2 (5th Cir. 1969). The following additional factors, *inter alia*, are strongly demonstrative of monopoly power when combined with ReaLemon's preponderant market share: (1) ReaLemon's enormous size and resource advantages over most competing processed lemon juice brands, including advantages such as nationwide marketing and the consequent ability to advertise nationally through national media; (2) the overwhelming dominance of the ReaLemon brand, and its acceptance over the years by the trade and the public as the premium brand; (3) the concomitant relative impotence and small market share of compet-

ing brands except possibly Golden Crown recently in some metropolitan areas; (4) the premium price commanded by the ReaLemon brand; (5) the competitive necessity for other lemon juice brands to sell at substantially lower retail prices on peril of losing shelf space and being forced from the market; (6) the exceptionally high profitability of ReaLemon lemon juice over the years amounting to three to four times the rate of return on assets realized by other firms in the "Food and Kindred Products" industry group.

The great market share controlled by ReaLemon historically, and at the conclusion of this record, viewed in conjunction with the foregoing factors, renders the existence of monopoly power of ReaLemon Foods in the processed lemon juice market beyond doubt. Instructive in this context is the Commission's comment in *Golden Grain Macaroni Co.*, 78 F.T.C. 63, 162, n. 7 (1971), *order enforced in part*, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973):

> A firm with roughly 50% of the market might possess monopoly power if the remaining firms, for some reason, were competitively impotent vis-a-vis the major firm. Such might be the case [153] if the major firm possessed capital assets far in excess of those of its competitors, in a market where assets were essential to competitive vitality; or if the dominant firm marketed a product with a strong consumer preference over its rivals, or if the remaining portion of the market was divided in small fragments, so that no one firm represented a meaningful countervailing force to the pricing activities of the dominant firm. However, none of these circumstances, nor any similar one, was shown to exist in the relevant market here.

All of the factors enumerated in the foregoing are present in this case.

The recent decline in market share of ReaLemon from a historic 90 percent to the present 75 percent does not establish that monopoly power does not exist in respondent Borden in the processed lemon juice industry. As the undersigned has found, the size of respondent's current market share, combined with the factors set out, among others, continues to confer on respondent control over prices and competition in the processed lemon juice industry. In the vast majority of metropolitan markets respondent Borden maintains dominant market shares from 75 to 90 percent, as well as 75 percent nationally.

Unlawful Maintenance of Monopoly Power

The most recent definition of the elements of monopolization by the Supreme Court is found in *United States* v. *Grinnell, supra*. The Supreme Court there held that the components of the offense of monopolization are two-fold (384 U.S. at 570-71): [154]

(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

The Commission followed this standard in *Golden Grain Macaroni Co., supra*, 78 F.T.C. at 157.

It has been found that Borden possesses monopoly power in the relevant market. The legality of Borden's acquisition of monopoly power is not here an issue. Thus, under the foregoing standard, the question in this proceeding is whether Borden willfully maintained that power.

The basic principles governing the law of monopolization were well established before *Grinnell*. Specific intent to obtain or to maintain a monopoly is not a necessary element of the offense. Rather, "[i]t is sufficient that . . . a monopoly results as the consequence of a defendant's conduct or business arrangements." *United States* v. *Griffith, supra*, 334 U.S. at 105. Monopolization is established by the possession of monopoly power "coupled with the purpose or intent to exercise that power." *Griffith*, at 107, citing *American Tobacco Co.* v. *United States, supra*, 328 U.S. at 809, 811, 814. To the same effect: *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110 (1948); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

The Supreme Court in *Griffith* and its companion cases, *Schine Chain Theatres* and *Paramount Pictures*, built upon Judge Learned Hand's landmark opinion in *Alcoa, supra*. The Court found that Alcoa monopolized the aluminum ingot market in that it "meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started." 148 F.2d at 432. In language specifically endorsed by the [155] Supreme Court in *American Tobacco Co., supra*, 328 U.S. at 814, the Second Circuit dispensed with Alcoa's contention that it was not chargeable with active perpetuation of its monopoly position (148 F.2d at 431):

It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret "exclusion" as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not "exclusionary." So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent.

See also *L. G. Balfour Co., supra*, 74 F.T.C. at 498-99.

The facts disclosed in the record of this case show clearly that Borden took deliberate actions to maintain its monopoly position in the processed lemon juice market, and did maintain a monopoly position despite some reduction in market share. Borden thereby "monopolized" as that term is understood in *Grinnell* and in the earlier cases just discussed. As did Alcoa, Borden "meant to keep, and did keep" a monopoly market share. The ReaLemon marketing plans and other evidence heretofore discussed leave no question that Borden saw its predominant position threatened by emerging competition from other processed lemon juice producers, [156] particularly Golden Crown, and set out specifically to preserve its monopoly power, *viz.*, its historic 90 percent market share.

As the record also shows, Borden engaged in a number of acts and practices, heretofore described, with the purpose of maintaining its monopoly position, and which had the effect of hindering, restraining or preventing competition in the processed lemon juice market. These acts and practices included geographically discriminatory prices, promotional allowances tailored to combat competition in particular areas where competition had arisen, granting to selected key retail stores special allowances designed to eliminate, hinder or restrict sales of competitive processed lemon juices, and taking steps selectively to reduce the retail price of its premium priced product to a level so low as to make it virtually impossible for other producers of processed lemon juice to sell their products at prices above their own cost. The record shows, as stated, that through these methods Borden succeeded in maintaining a monopoly position. Thus, Borden engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

Respondent denies that it engaged in conduct sufficient to constitute monopolization. Relying largely on *Telex Corp.* v. *International Business Machines Corp.*, 510 F.2d 894, 925-26 (10th Cir. 1975), *cert. dismissed* 96 S. Ct. 8 (1975), Borden asserts that two factors must be present before maintenance of monopoly power in violation of Section 2 can be found (respondent's reply memorandum at 59): "[f]irst, the behavior must be the product of monopoly power, *i.e.*, constitute a use of monopoly power and second, must be exclusionary as distinct from legitimate business behavior." [157]

The Court's discussion of monopolization as a whole in *Telex* reveals that its conclusion that IBM had not violated Section 2 was based on what it termed the "unusual market circumstances" present in that case. The court's basic conclusion was a limited one (510 F.2d at 927):

There must be some room to move for a defendant who sees his market share acquired

by research and technical innovations being eroded by those who market copies of its products. It would seem that technical attainments were not intended to be inhibited or penalized by a construction of Section 2 of the Sherman Act to prohibit the adoption of legal and ordinary marketing methods already used by others in the market, or to prohibit price changes which are within the "reasonable" range, up or down. Under the unusual market circumstances before us, to so interpret the Act to prohibit such actions is to protect the others in the market from ordinary competition, and was an incorrect interpretation of applicable law.

Borden's attempt to bring itself within the protection afforded by this pronouncement is unavailing. Unlike IBM, Borden was not faced with erosion of a market share "acquired by research and technical innovation" by firms marketing copies of its products developed through misappropriation of its trade secrets and infringement of its copyrights. Rather, Borden was faced with market entry and price competition from [158] other sellers of its technologically simple product, differentiated from other brands of processed lemon juice only by the unique consumer acceptance of its brand name. Second, as has previously been found, Borden's marketing methods can hardly be characterized as "legal and ordinary," and some of its prices have been found to be unreasonable.

Borden relies on *Griffith, supra*, 334 U.S. at 107, for the proposition that "a prerequisite of illegality under Section 2 is the *use* of monopoly power." Respondent's reply memorandum at 57. This interpretation, in the view of the law judge, is a misreading of *Griffith*. While in that case the Supreme Court did find a use by the defendants of their monopoly power in some cities to gain competitive advantage in cities where they did not enjoy a monopoly position, which conduct the Court found to violate Section 2, it is evident that this conduct was considered merely a particularly clear form of monopolization. The statement on which Borden relies, when placed in context, reads as follows (334 U.S. at 107):

So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under §2 even though it remains unexercised. For §2 of the Act is aimed, *inter alia*, at the acquisition or retention of effective market control. See *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 428, 429. Hence the existence of power "to exclude competition when it is desired to do so" is itself a violation of §2, provided it is coupled with the purpose or intent [159] to exercise that power. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809, 811, 814. It is indeed "unreasonable, *per se*, to foreclose competitors from any substantial market." *International Salt Co.* v. *United States*, 332 U.S. 392, 396. The anti-trust laws are as much violated by the prevention of competition as by its destruction. *United States* v. *Aluminum Co. of America, supra*. It follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.

Borden's conduct as shown in this record is not simply "ordinary

business behavior," unrelated to its monopoly position (respondent's reply memorandum at 57-58). On the contrary, the course of conduct shown here was intentionally devised and carried out for the purpose of maintaining its dominant market position in the sale of processed lemon juice. Moreover, it was because of Borden's dominant market position nationwide, and the power over price conferred on it by the premium commanded by the ReaLemon brand, that the acts shown by this record were effective in maintaining a monopoly position. Nor were the acts and practices reflected in the record "nothing more than legitimate business activities designed to allow ReaLemon to compete, not to exclude competition." As stated, ReaLemon's conduct was intended to, and did, maintain a monopoly position. By doing so, Borden plainly hindered and restricted and, in fact, excluded competition.[5] Thus, for example, [160] the 1974 Marketing Plan, quoted earlier, set out the ReaLemon objective of reducing Golden Crown's market share by 20 percent in 4 key metropolitan areas, and stated that reducing Golden Crown's effectiveness in these 4 markets may result "in a significant reduction of expansion leverage" (CX 4, p. 864). This is the core of monopolization.

It is well established that a finding of monopolization does not require that "predatory" or independently unlawful means be used. *Hanover Shoe Inc.* v. *United Shoe Machinery Corp.*, 390 U.S. 481, 497-99, (1968). In *Alcoa* Judge Hand assumed that the defendant was guilty of no "moral derelictions," but found that the company had sought to maintain control of the market, and had maintained control. That was sufficient to establish a violation. 148 F.2d 431. See also *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 344-45 (D. Mass., 1953), *aff'd per curiam*, 347 U.S. 521 (1954); *L. G. Balfour Co., supra*, 74 F.T.C. at 498-99; *L. G. Balfour* v. *Federal Trade Commission, supra*, 442 F.2d at 14.

As has previously been discussed, Borden's actions cannot be justified by Golden Crown's sales at or below cost. Given the market conditions shown by this record, primarily the limited grocery store shelf space available to processed lemon juice, the consumer acceptance of the ReaLemon trade name and the price premium it commanded, the only competitive tool available to a new entrant like Golden Crown in its efforts to break into the market was to offer [161] its product at a very low price. Allowing Borden to respond to

[5] It is not necessary, however, that competitors actually be excluded from the market to establish a violation of Section 2. *American Tobacco Co., supra*, 328 U.S. at 809, n.11

> "[T]he material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so."

Monopoly power, whether lawfully or unlawfully acquired, may violate Section 2 even if it remains unexercised provided it is coupled with an intent to use it. *Griffith, supra*, 334 U.S. at 107, as just quoted.

this type of competition by all of the actions reviewed herein would give it free rein to preserve its monopoly position. In this case, in the judgment of the undersigned, Borden overstepped the bounds of permissible response to a new entrant of limited resources by one possessing monopoly power.

What Borden fails to acknowledge is that the law imposes on one in possession of monopoly power limitations on conduct not applicable to one lacking such power.[4] A monopolist may not react to each new entry into its market with an unrestrained attempt to protect its market position, for to do so preserves the "effective market control" condemned by the law. *United States* v. *Griffith*, *supra*, 334 U.S. at 107. Borden's actions taken to preserve its market control, as shown by this record, violated Section 5 of the Federal Trade Commission Act.

IV

CONCLUSIONS

1. Respondent Borden, Inc. has been engaged at all times relevant hereto in the production, marketing and sale of processed lemon juice in interstate commerce as defined in the Federal Trade Commission Act, and the acts and practices utilized by respondent Borden in connection therewith have been in such interstate commerce. [162]

2. The production, marketing and sale of processed lemon juice, and the United States as a whole, constitute valid and lawful product and area markets within which to determine the charges against respondent Borden, Inc., set out in the complaint.

3. Respondent Borden, Inc. possesses, and has possessed, a monopoly position and monopoly power in the processed lemon juice market, and has unlawfully engaged in acts and practices with the purpose and intent, and with the effect, of preserving and maintaining that monopoly position and power, and has unlawfully hindered, restrained and prevented competition in the production, marketing and sale of processed lemon juice in violation of Section 5 of the Federal Trade Commission Act.

4. This proceeding and the order set out herein are in the public interest.

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[4] For this reason, in the opinion of the undersigned, *International Air Industries* v. *American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3493 (1976), *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F.2d 456 (9th Cir. 1956) and *Golden Grain Macaroni Co.*, *supra*, cited by Borden in support of its contention that its pricing policies were lawful, are simply not pertinent to the issues present in this case.

V

REMEDY

It has been found that respondent Borden possessed a monopoly position and power in the processed lemon juice industry, that it engaged in business conduct with the purpose and intent, and with the effect, of preserving and maintaining that monopoly position and power. It has been found that respondent Borden succeeded in maintaining its monopoly position and power nationally, and in the great majority of the country's major metropolitan markets. Under the circumstances, the question becomes one of proper relief. In a "monopolization" case, adequate relief must put an end to the monopoly position, and break up or render impotent the monopoly power found to have been preserved and maintained in [163] violation of law. *United States* v. *Grinnell, supra,* 334 U.S. at 577; *United States* v. *Paramount Pictures, supra,* at 171. In *Schine Theatres* v. *United States, supra,* at 128, the Court stated:

> In this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors. Such a course would make enforcement of the Act a futile thing unless perchance the United States moved in at the incipient stages of the unlawful project. For these reasons divestiture or dissolution is an essential feature of these decrees.

See, likewise, *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 188–89 (1944). Doubts respecting relief are to be resolved in favor of the government. *United States* v. *Bausch & Lomb Optical Company*, 321 U.S. 707, 726 (1944). The Commission has wide discretion in determining the type of order necessary to bring an end to the violation found to exist, so long as the remedy has a reasonable relation to such violation. *Federal Trade Commission* v. *National Lead Company*, 352 U.S. 419 (1957).

Enjoining the acts and practices by which respondent knowingly preserved and maintained its monopoly position, and prohibition of a repetition [164] thereof, will not constitute an adequate remedy in this proceeding and end the monopoly power possessed by ReaLemon Foods in the processed lemon juice industry. The heart of the monopoly power preserved and maintained by respondent Borden lies in the ReaLemon trademark and its dominant market position. For competition to enter the processed lemon juice industry, the barrier to entry which inheres in the ReaLemon trademark must be eliminated. As a consequence, in the judgement of the undersigned,

the only effective relief under the facts shown by the record in this case requires the licensing of the ReaLemon brand name to others wishing to enter the production, marketing and sale of processed reconstituted lemon juice.

Such a course is not unprecedented. In *American Cyanamid Co.*, 63 F.T.C. 1747 (1963), the Commission, after a finding of suppression and exclusion of competition through the use of a patent obtained by deliberate misrepresentations of material facts, directed compulsory licensing to open the tetracycline industry to competition. A two and one-half percent royalty of net sales under such licenses was granted. 63 F.T.C. at 1910. The Commission's compulsory licensing order was approved by the Court of Appeals although the decision was vacated and remanded because of the disqualifications of a Commissioner. *American Cyanamid Co.* v. *Federal Trade Commission*, 363 F.2d 757, 771-72 (6th Cir. 1966). After hearings on remand, compulsory licensing of the tetracycline patent was again ordered by the Commission and affirmed on appeal. *American Cyanamid Co.*, 72 F.T.C. 623, 690 (1967), *aff'd. sub nom. Chas. Pfizer & Co.* v. *Federal Trade Commission*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969). In issuing its order the Commission further stated that it was not limited to instances of patent abuse in employing compulsory licensing decrees, citing *United States* v. *United Shoe Machinery Corp., supra*, 110 F. Supp. at 351, where Judge Wyzanski stated: [165]

> [Defendant] is being required to reduce the monopoly power it has, not as a result of patents, but as a result of business practices. And compulsory licensing on a reasonable royalty basis, is in effect a partial dissolution, on a non-confiscatory basis. . . . [T]he decree does no more than what defendant's own expert recognized would be appropriate if the Court found defendant had monopolized the shoe machinery market.

A requirement for compulsory licensing of a trademark, such as ReaLemon, is not essentially different from a requirement of compulsory licensing of a patent. Accordingly, it is clear that the Commission has such authority and, as stated, compulsory licensing of the ReaLemon trademark is not only reasonably related to the violation here found, but is indispensable to the restoration of competition in the processed lemon juice industry. In this connection see Dr. Mann (Tr. 499-501, 6131-32; and findings among others, 80 through 87).

Complaint counsel propose a royalty of one-half of one percent of net sales of reconstituted lemon juice made by the licensee, pointing out that the after tax profits for manufacturers of food and kindred products for the three (3) years ending in the third quarter of 1975, was 2.83 percent of sales (FTC Quarterly Financial Reports). Under

these circumstances, and assuming in time the processed lemon juice industry becomes as competitive as the food and kindred products industry generally, the one-half of one percent appears to the law judge to be reasonable, and is probably sufficient to compensate respondent Borden for costs attendant upon such licensing and the quality control requirements. However, if experience with the licensing provision of the order shows after a reasonable time that the [166] cost to Borden of administering the quality control standards exceeds the amount of royalties received from the licensees, Borden may apply to the Commission for a modification of the order, showing the inadequacy of the royalty and the amount which would be sufficient to compensate Borden for its expenses.

Complaint counsel urge that respondent Borden be required to manufacture and pack reconstituted lemon juice, for a period of five years, for any firm other than Golden Crown or Sunkist desiring such an arrangement. The purpose of this co-packing requirement is to facilitate the entry of new producers into the processed lemon juice industry by sparing them the necessity for making an initial capital investment. The record, however, does not provide a basis for such relief.

Processed lemon juice of the type sold by Borden under the ReaLemon brand is a fairly simple product to manufacture requiring relatively inexpensive equipment (Finding 9). Furthermore, complaint counsel assert that co-packing is an "accepted industry practice" (complaint counsel's memorandum in support, p. 110) suggesting that packing facilities are available to new entrants, if needed. The co-packing provision of the proposed order does not appear necessary to restore competition to the processed lemon juice industry, and has therefore been omitted from the order issued herein. [167]

VI

ORDER

It is ordered. That respondent, Borden, Inc., a corporation, for a period of ten (10) years from the date of this order, upon written request from any person, partnership, corporation or business entity engaged in or desiring to enter the business of producing and marketing processed lemon juice, grant a license to such person, partnership, corporation or business entity to use the name "ReaLemon" and the label design of ReaLemon on containers of reconstituted lemon juice. The "ReaLemon" name and label design may be used under such licenses in conjunction with other brand names. Such licenses shall contain no restrictions or limitations, unless approved by the Federal Trade Commission, except the following: (1) licensees must agree to disclose conspicuously on all containers of reconstituted lemon juice produced and marketed pursuant thereto the identity of the manufacturer or distributor, and (2) licenses may contain provisions (a) allowing respondent Borden to collect royalties of not more than one-half of one percent (0.5%) of the dollar sales of [168] reconstituted lemon juice produced and marketed thereunder, and (b) providing for reasonable quality control standards for the production of reconstituted lemon juice by licensees, equal to the quality of respondent Borden's ReaLemon reconstituted lemon juice. Such quality control standards shall be administered by an independent third party or parties acceptable to both Borden, Inc., and the licensee, and such party or parties shall be compensated by Borden, Inc. If after a reasonable time it is demonstrated that the one-half of one percent royalty is inadequate to compensate Borden for the cost of administering the foregoing quality control standards, Borden may apply to the Commission for modification of this order, showing the fact and the amount of royalty which would adequately compensate it for such expenses.

It is further ordered. That respondent, Borden, Inc., shall advertise the availability of the licensing provisions of this order in three significant trade journals once every three (3) months for a period of five (5) years from the date of this order. [169]

It is further ordered. That Borden, Inc., and its successors and

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assigns, officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, affiliate, division or other device, in connection with the production, marketing and sale of processed lemon juice in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

(1) Granting price reductions, directly or indirectly, which result in different net prices among Borden's ReaLemon customers competing in the same geographic area, the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice;

(2) Selling ReaLemon lemon juice below its cost or at unreasonably low prices, the effect of which is to hinder, restrain [170] or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice;

(3) Granting promotional allowances or payments of any kind for customers' promotional services, the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice.

It is further ordered. That Borden, Inc., shall, within sixty (60) days from the date of this order becomes final, and periodically thereafter as required by the Federal Trade Commission, submit a detailed written report of its actions, plans and progress in complying with the provisions of this order, and fulfilling its objectives.

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CLERK

No. 82-328

In the Supreme Court of the United States

OCTOBER TERM, 1982

BORDEN, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION SUGGESTING MOOTNESS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION SUGGESTING MOOTNESS

The Solicitor General, on behalf of the Federal Trade Commission, suggests that this case has become moot because it has been settled, and that in the circumstances, the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to that court with instructions that it remand the case to the Commission for entry of the modified cease-and-desist order to which the parties have agreed.

STATEMENT

1. In this case the Federal Trade Commission found that petitioner Borden, Inc., violated Section 2 of the Sherman Act, 15 U.S.C. 2, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by monopolizing the market for processed lemon juice in the United States (Pet. App. 42a n.4). The court of appeals affirmed (*id.* at 1a-32a).

The Administrative Law Judge ("ALJ") found (Pet. App. 94a-198a): (1) that petitioner possessed monopoly power in the national market for processed lemon juice; and (2) that petitioner had intentionally used this power to repulse competitive initiatives by new entrants through selective geographic price discrimination and promotions that produced unreasonably low prices in contested areas. He expressly found, however, that petitioner had always priced above its own average variable costs (*id.* at 166a-176a).

The Commission unanimously adopted the ALJ's findings concerning the product and geographic markets and Borden's monopoly power in them (Pet. App. 42a-53a, 74a-78a). Basing their decision solely on Section 2 of the Sherman Act (*id.* at 42a n.4), all five Commissioners agreed that Borden had violated that statute, and thus Section 5 of the Federal Trade Commission Act, by using its monopoly power to restrain competition (Pet. App. 39a-93a).[1]

The Commission found that Borden's power was traceable directly to the ReaLemon trademark (Pet. App. 65a):

> In order to preserve its market dominance it manipulated the price premium which that trademark afforded, and engaged in price discrimination. ReaLemon's juice was indistinguishable in its characteristics from competing processed lemon juices; only the market power inherent in the ReaLemon trademark enabled Borden to manipulate price differentials and discriminate among customers in different areas to maximize its advantage over other producers.

Although it concluded that while an image advantage permitting the maintenance of a price premium is like a unit cost advantage, the Commission condemned Borden's pricing practices because temporary price cut-

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[1] Two members, concurred separately (see note 4, *infra*).

ting that excludes "'producers handicapped only by an inferior brand image is socially undesirable'" (Pet. App. 65a).[2]

The Commission noted also that certain commentators condemn as predatory only sales below average *variable* cost, while others also disapprove of sales below average *total* cost, with the intent to exclude an equally efficient competitor.[3] It ruled that while the record did not show "ReaLemon was sold below average *variable* cost, at least not as a consistent course of conduct, it does appear that Borden sold below average *total* cost, when fixed costs are added in" (Pet. App. 61a (emphasis added)). The Commission then held (*id.* at 65a-66a (footnotes omitted)):

> [W]hether or not Borden sold below short-run marginal cost, it is incontrovertible that its pricing practices, including geographic discrimination which was not cost-justified and pricing very close to average variable cost, were exclusionary in intent and effect. To the extent that Borden priced below average total cost with the evident intent to exclude Golden Crown, its practices run afoul of Posner's rule [see note 3, *supra*]. In any event, the effect of Borden's spurious product differentiation, making it necessary for competitors to sell considerably below ReaLemon, created a circumstance where even prices above marginal cost could, as

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[2] The Commission was quoting from Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869, 889 (1976).

[3] The Commission observed that "[v]ariable costs are costs which vary as output varies, as distinguished from fixed costs, which remain constant at differing levels of output" (Pet. App. 60a n.30). The "average variable cost" test for predatory pricing is proposed in 3 P. Areeda & D. Turner, *Antitrust Law* § 715d (1978). The "average total cost/intent to exclude" test is proposed in R. Posner, *Antitrust Law: An Economic Perspective* 188-193 (1976).

> the record indicates [Pet. App. 176a-178a,] be predatory in the sense that even equally efficient competitors could be driven from the market.

The Commission's final order (Pet. App. 93a) provided that whenever the effect would be to "hinder, restrain or eliminate competition" between Borden and its competitors in the sale of processed lemon juice, Borden was prohibited from discriminating in price to any customer without cost justification, selling ReaLemon below its cost or at unreasonably low prices, or granting promotional allowances or payments for promotional services. The Commission explained that "[w]hether a price is 'unreasonably low' must be determined by reference to Borden's own costs, its awareness of its competitors' costs, historic price differentials, and competitive conditions in the market" (Pet. App. 68a n.41).[4]

2. On petition for review, a divided court of appeals affirmed and enforced the Commission's order (Pet. App. 1a-32a). It held that substantial evidence supported the Commission's findings (*id.* at 12a-22a). Moreover, the court ruled that, like the Commission, it need

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[4] Commissioner Clanton's separate concurrence endorsed the majority view that Borden had unlawfully maintained its monopoly power, but he would have based liability exclusively on a finding that in some markets Borden had priced below its average variable costs (Pet. App. 74a-77a). He also would have limited the final order to prohibiting sales below average variable costs (*ibid.*).

Commissioner Pitofsky, also concurring separately, agreed with the majority that Borden's manipulation of its brand-based premium price to drive equally efficient rivals out of the market was a key element in finding monopolization, to the extent that Borden priced below its average total costs. He concluded, however, that little weight should be given to Borden's intent (Pet. App. 78a-93a). He also questioned geographic price discrimination as an independent basis of liability (*ibid.*). Commissioner Clanton shared these reservations (*id.* at 74a).

not choose between the average variable or average total cost tests in order to determine predation (*id.* at 28a). Instead, the court held (*id.* at 29a):

> that when a monopolist, through brand identification or otherwise, can and does manipulate prices in such a way as to exclude equally efficient competitors by requiring them to sell below their average variable costs, such price manipulation is an unreasonable use of power to maintain the monopolist's market position.

Judge Kennedy, dissenting (Pet. App. 33a-38a), concluded that the record contained no proof that Borden had an intent to use its monopoly power in an unreasonably anticompetitive manner, and that its efforts to win market share by advertising, promotional campaigns and price reduction evidenced the normal competitive process. She emphasized that the Commission had not found that Borden used monopoly profits in one market to subsidize losses in others or that its selective price reductions violated the Robinson-Patman Act. Borden's reliance on consumer preference for its trademarked product was also proper. The Commission's decision, in her view, improperly required Borden to establish an above-cost price umbrella to protect competitors.

3. After the petition for a writ of certiorari had been filed, the Commission agreed with Borden to settle the judicial review proceedings. Under the terms of the settlement, the Commission will, upon reacquiring jurisdiction, enter a modified cease-and-desist order.[5]

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[5] The Commission has no jurisdiction to change its prior order so long as the record in the case is before the courts on judicial review. 15 U.S.C. (& Supp. V) 45(b) and (c). Upon the completion of all proceedings on judicial review, including any proceedings on petition for a writ of certiorari in this Court, the Commission will reacquire jurisdiction to alter, modify or set aside its order. 15 U.S.C. 45(g).

On March 3, 1983, the Commission published in the Federal Register a notice inviting public comment on a proposed agreed order in settlement of the proceedings. The proposed order bars Borden, for a period of seven years, from pricing processed lemon juice below Borden's variable costs for the product in any sales district. In addition, the order contains detailed definitions of its terms and a requirement that Borden file annual reports containing information necessary to permit the Commission to monitor compliance (48 Fed. Reg. 9023-9032 (1983), App. A, *infra*, 1a-42a).

The proposed order was accompanied by an explanatory statement to aid public comment (48 Fed. Reg. 9024 (1983), App. A, *infra*, 6a). The statement notes that the Commission had determined to settle the pending litigation because the decision under review did "not set forth a satisfactory, cost-based standard for predation under Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act" (*id.* at 9025, App. A, *infra*, 7a). Continued defense of the decision before this Court would be inconsistent with its present view, which is that the grounds of its decision under review "may discourage dominant firms from vigorously competing" (*id.* at 9025, App. A, *infra*, 8a).

The Commission concluded that its earlier treatment of Borden's trademark was mistakenly based upon a view of "product differentiation as something pernicious in and of itself, which rendered suspect *any* attempt by Borden" to respond to competition by reducing price (48 Fed. Reg. 9025 (1983), App. A, *infra*, 10a). This approach, it concluded, failed to consider "the competitive advantages of Borden's product differentiation, and antitrust law's promotion of interbrand competition" (*id.* at 9026, App. A, *infra*, 11a-12a). The Commission also found its earlier treatment of geographic price discrimination to be unsound because it would improperly require dominant firms to maintain uniform monopoly

prices nationwide in order to protect competitors, a result that it characterized as paradoxical and anticompetitive (*id.* at 9026-9027, App. A, *infra*, 12a-13a). It also found its earlier treatment of Borden's intent to be mistaken. That intent simply reflects a purpose to compete in defense of existing market share. The Commission's earlier finding of predatory intent did not rest upon sub-cost pricing that might be condemned as exclusionary under Section 2 of the Sherman Act, but rather on executive plans that were wholly consistent with zealous competition (48 Fed. Reg. 9026 (1983), App. A, *infra*, 13a-14a). Finally, the Commission determined that its earlier opinion had erroneously invited the court of appeals' holding "condemning price manipulation by a monopolist if such conduct forces its *competitors* to price below *their own* average variable cost" (*id.* at 9026, App. A, *infra*, 15a-17a). It declared that such a pricing umbrella is wholly inconsistent with the concept of price competition the Sherman Act was designed to promote.

For these reasons, the Commission concluded that its earlier opinion had not clarified a proper standard for determining predatory pricing by dominant firms, nor was it consistent with sound antitrust policy under Section 2 of the Sherman Act. The Commission therefore determined tentatively to accept the proposed agreed order, subject to a 30-day comment period. It emphasized, however, that the standard set forth in that proposal would not necessarily be appropriate in any other case, and that the order was being adopted simply as "an appropriate settlement of the pending litigation" (48 Fed. Reg. 9028 (1983), App. A, *infra*, 18a-20a).[6]

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[6] Commissioner Clanton issued a separate statement emphasizing the latter point (48 Fed. Reg. 9028 (1983), App. A, *infra*, 20a-22a).

Commissioner Pertschuk dissented on the grounds that it was improper for the Commission to revise its decisions administra-

Five comments were received in response to the notice. After considering them, the Commission, by minute order of April 21, 1983, voted to accept the settlement, and to ask this Court to grant certiorari, vacate the court of appeals decision, and to direct a remand to the Commission for entry of the agreed order.[7]

DISCUSSION

Petitioner's consent to the entry against it of a modified cease-and-desist order as soon as the Commission reacquires jurisdiction in this case terminates the case or controversy presented by Borden's petition for review in the court of appeals and renders this case moot. *Hammond Clock Co.* v. *Schiff*, 293 U.S. 529 (1934); *J. Aron & Co.* v. *Mississippi Shipping Co.*, 361 U.S. 115 (1959). In the circumstances of this case, the Court should follow the practice used in *J. Aron*, *supra*, by granting the petition for writ of certiorari, vacating the judgment of the court of appeals, and remanding the case to that court with directions for its disposition. Since the Commission has agreed to enter the agreed order when it reacquires jurisdiction, the court of ap-

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tively while they were pending on judicial review; that the earlier decision reflected sound antitrust policy; and that the proposed revised order was deficient in numerous respects (48 Fed. Reg. 9028-9030 (1983), App. A, *infra*, 23a-31a). He subsequently dissented from the request for vacation of the court of appeals' judgment (App. B, *infra*, 43a-44a).

Commissioner Bailey also dissented. She disagreed with the policy analysis in the Commission's statement; found the proposed order to pose numerous practical problems of enforcement; and concluded that the proposed settlement reflected a serious distortion of both the administrative process and the proper relationship between agencies and reviewing courts (48 Fed. Reg. 9030-9032 (1983), App. A, *infra*, 31a-40a).

Commissioner Douglas issued a separate statement concurring in the majority's reasoning and disputing the dissenters' positions (48 Fed. Reg. 9032 (1983), App. A, *infra*, 41a-42a).

[7] Commissioners Bailey and Pertschuk opposed.

peals should be directed to remand the case to the Commission for that purpose. Cf. *Board of Governors of the Federal Reserve System* v. *Security Bancorp*, 454 U.S. 1118 (1981).

The suggested disposition is appropriate in this case. First, it is evident from the statement explaining the Commission's repudiation of the decision affirmed below (see pages 6-7, *supra*) that Borden's petition for a writ of certiorari presents a substantial question of antitrust law: the pricing standards dominant firms may adopt, consistently with Section 2 of the Sherman Act, in competing to defend their share of local markets. Second, if not vacated, the decision of the court of appeals would be likely to spawn legal consequences affecting both the interpretation of Section 2 of the Sherman Act by district courts within the Sixth Circuit, and affecting the litigating posture of petitioner in any future antitrust cases arising out of the pricing conduct the Commission condemned.[8] Third, if the court's decision stands, the Commission's repudiation of the grounds upon which it was founded would produce an unseemly conflict, in the same case, between the decisions of the reviewing court and the agency reviewed. These factors support exercise of this Court's certiorari jurisdiction to vacate the judgment below under the es-

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[8] Under Section 5(a) of the Clayton Act, (Supp. V) 15 U.S.C. 16(a), no collateral estoppel effect may "be given to any finding made by the Federal Trade Commission under the antitrust laws or under [Section 5 of the Federal Trade Commission Act,] which could give rise to a claim for relief under the antitrust laws." This provision, however, does not foreclose claims that the Commission's findings have a prima facie effect under the Clayton Act. Two circuits recognize such an effect. *Purex Corp.* v. *Procter & Gamble Co.*, 453 F.2d 288 (9th Cir. 1971), cert. denied, 405 U.S. 1065 (1972); *Farmington Dowel Products Co.* v. *Forester Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969). See H.R. Rep. No. 96-874, 96th Cong. 2d Sess. 4-5 (1980). The Commission takes no position as to the soundness of these cases.

tablished practice for dealing with cases that become moot while on their way to this Court. *United States* v. *Munsingwear*, 340 U.S. 36 (1950); *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92 (1979).[9]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to that court with directions that it be remanded to the Commission for entry of the agreed cease-and-desist order.

Respectfully submitted.

REX E. LEE
Solicitor General

HOWARD E. SHAPIRO
*Acting General Counsel**
Federal Trade Commission

MAY 1983

* The Commission's General Counsel is recused from this case.

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[9] In private litigation, some courts of appeals have said that they need not automatically vacate the judgment below if a case on appeal becomes moot by settlement. Instead, they simply dismiss the appeal. See *Ringsby Truck Lines, Inc.* v. *Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982); *Cover* v. *Schwartz*, 133 F.2d 541, 546-547 (2d Cir. 1942) cert. denied, 319 U.S. 748 (1943). This Court's dispositions of *Hammond Clock* and *J. Aron*, *supra*, indicate, however, that settlement is not invariably a bar to vacation of the judgment below. As shown above, in this case there are substantial reasons why the court of appeals' judgment should be vacated in the public interest.

APPENDIX A

FEDERAL TRADE COMMISSION

16 CFR Part 13

[Docket No. 8978]

BORDEN, INC.; PROPOSED ORDER MODIFICATION WITH STATEMENT TO AID PUBLIC COMMENT

AGENCY: FEDERAL TRADE COMMISSION.

ACTION: PROPOSED AGREED ORDER IN SETTLEMENT OF JUDICIAL REVIEW PROCEEDINGS.

SUMMARY: Ir. settlement of judicial review proceedings resulting from the entry of a Commission cease ad desist order after full adjudicatory proceedings, this agreed modification, accepted subject to final Commission approval, would require a producer of processed lemon juice to refrain, for a period of seven years, from pricing its product below its variable costs for the product in any sales district. "Variable costs" would be defined as all costs which the firm could have chosen not to incur during the relevant time period. The relevant time period would consist of all consecutive fiscal quarters in which the firm's prices failed to cover it total costs, and thus would vary with the duration of any price reduction. The firm would also be required to file annual compliance reports detailing its market share, costs and net revenues. The proposed order would take the place of an order previously entered by the Commission, which was affirmed by a court of appeals in a judgment that is the subject of a pending petition for a writ of certiorari in the Supreme Court. *In the Matter of Borden, Inc.*, 92 F.T.C. 669, 778, 832 (1978) affirmed *Borden, Inc.* v. *FTC*, 674 F.2d 498 (1982), petition for a writ of certiorari filed August 25, 1982, Sup. Ct. No. 82-328.

DATE: Comments must be received on or before April 4, 1983.

ADDRESS: Comments should be directed to: FTC/S, Office of Secretary, Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT: FTC/CD, Barbara A. Clark, Washington, D.C. 20580, (202) 634-4793.

SUPPLEMENTARY INFORMATION: Pursuant to Section 5(c)-(k) of the Federal Trade Commission Act, 38 Stat. 719-721, as amended, 15 U.S.C. 45(c)-(k) and an order of the Commission entered on February 25, 1983 notice is hereby given that the following agreed order to cease and desist, having been accepted by the Commission in settlement of litigation, subject to final approval, has, in the exercise of the Commission's discretion, been placed on the public record for a period of thirty [30] days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(14) of the Commission's Rules of Practice (16 CFR 4.9(b)(14)).

PROPOSED ORDER

The Commission having considered the proposal of Borden, Inc., to terminate the pending processings for judicial review of the order to cease and desist entered herein on November 7, 1978; and the Commission and Borden having agreed upon the provisions of a final order modifying the order of November 7; accordingly,

It is hereby ordered, that the Commission's Order in this matter, dated November 7, 1978, is hereby revised to read as follows:

ORDER

It is ordered, that Respondent, in connection with the production, marketing and sale of processed lemon juice in or affecting commerce, as "commerce" is de-

fined in the Federal Trade Commission act, shall forthwith cease and desist from:

Selling ReaLemon brand reconstituted lemon juice at a price or prices so that Respondent's net revenue during any fiscal quarter for any sales district is below Respondent's variable cost of the product sold in that quarter and sales district.

For purposes of this Order only, the following definitions shall apply:

A. "Total cost" means the sum of all costs properly attributable to sales made by Respondent of ReaLemon brand reconstituted lemon juice during the relevant fiscal quarter in the relevant sales district.

1. "Total cost," and its various elements, shall be calculated in the same manner as reflected in Respondent's accounting records as of January 1, 1983. With respect to elements of cost incurred over geographic markets that do not coincide with Respondent's sales districts, such elements of cost shall, be allocated to a sales district on the basis of unit volume sold during the relevant quarter in the relevant sales district, or on the basis of identifiable factors that make allocation to a particular sales district proper, or on the basis of a combination of these two approaches. Similarly, with respect to allocations of elements of cost which, as of January 1, 1983, were made only annually, such elements of cost shall be apportioned to the relevant quarter on the basis of the unit volume sold during that quarter in the relevant sales district, or on the basis of identifiable factors that make allocation to a particular quarter proper, or on the basis of a combination of the these two approaches. The methods of allocation chosen shall be uniform for all sales districts and for all quarters for which an annual compliance report must be submitted. The methods shall not be changed without prior notice to the Commission.

2. The cost of spot television advertising purchased for a station in a particular sales district shall be allocated to the sales district in which the station is located. The costs of all television advertising other than spot television shall be allocated to the relevant sales district for the relevant time period on the basis of the volume of unit sales in that district.

B. "Variable cost" means the sum of all cost included within total cost which Respondent could have avoided during the relevant time period.

1. A cost, whether an element of cost or a portion of an element of cost, shall be considered as one which Respondent could have avoided if, during any part of the relevant time period, Respondent could have chosen not to incur that cost consistent with prudent business practices, and without violating contractual or other legal commitments.

2. The relevant time period, for any fiscal quarter and sales district in which Respondent's net revenue in that quarter and sales district was below its total cost, shall be the period composed of the quarter and any consecutive preceding quarters in which Respondent's net revenue in that sales district was also below its total cost. The relevant time period for any other fiscal quarter and sales district shall be the period composed of that quarter.

C. "Net revenue" means gross revenue to Respondent resulting from sales of ReaLemon brand reconstituted lemon juice, net of returns and allowances, cash discounts, and trade promotions. "Net revenue" and its various elements shall be calculated in the same manner as reflected in Respondent's accounting records as of January 1, 1983.

D. "Fiscal quarter" means the period which coincides with Respondent's standard accounting quarters.

E. "Sales district" means each of the geographic subdivisions of the country, designated, identified and used

as such by Respondent in its sales and accounting records (currently twenty-two (22)). If the sales district are changed, the Commission will be notified.

F. "Trade promotions" means discounts or other financial incentives to the grocer or wholesaler, such as buying allowances or retailer coupons. "Trade promotions" (regardless of the manner in which that term is used by Borden in its accounting records) shall not be considered as a "cost" and shall be considered a reduction in net revenue.

G. "Unit" means one case of 12 bottles of ReaLemon brand reconstituted lemon juice in the 32 ounce size, or an equivalent volume of ReaLemon brand reconstituted lemon juice bottled in different sizes.

H. "Respondent" means Borden, Inc., its successors and assigns, officers, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, affiliate, division, or other device.

It is further ordered, that this Order shall remain in effect for seven years from the date it becomes final. During that period, Respondent shall file annual compliance reports with the Commission within 60 days of the end of its fiscal year. Each annual report shall include, for each sales district in which Respondent sold ReaLemon brand reconstituted lemon juice: (a) Copies of A.C. Nielson market survey reports, or substantially similar market survey reports, detailing the quarterly and annual market shares of ReaLemon brand reconstituted lemon juice and the quarterly and annual market shares of its branded and private label competitors, (b) an accounting quarterly of its total costs for ReaLemon brand reconstituted lemon juice, and (c) an accounting quarterly of its net revenue from sales of ReaLemon brand reconstituted lemon juice.

Each annual report shall also include, for each sales district and fiscal quarter in which Respondent's net revenue for such sales district and fiscal quarter was

below its total cost, proof that Respondent's net revenue in that district and quarter exceeded Respondent's variable costs of the product sold in that district and quarter.

STATEMENT OF THE COMMISSION ON THE PROPOSED ORDER MODIFICATION IN BORDEN, INC., TO AID PUBLIC COMMENT

The Federal Trade Commission has provisionally determined to accept an agreement from Borden, Inc. to settle the pending proceedings for judicial reveiw of a previous Commission order.

The proposed order modification has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this time will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

In its opinion and final order in this case, the Commission found that Borden, Inc., had violated Section 2 of the Sherman Act, 15 U.S.C. 2, and consequently, Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by monopolizing the market for processed lemon juice in the United States.[1] *In the Matter of Borden, Inc.*, 92 F.T.C. 669, 778, 832 (1978). On respondent's petition for review, the United States Court of Appeals for the Sixth Circuit affirmed and enforced the Commission's order. *Borden, Inc.* v. *FTC*, 674 F.2d 498 (1982). On August 25, 1982, Borden filed a petition for a writ of certiorari in the Supreme Court of the

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[1] The Commission decided this case solely under the standards of monopolization developed under Section 2 of the Sherman Act, as comprehended within Section 5 of the Federal Trade Commission Act. It expressly noted that it did not address other possible grounds for liability under Section 5 of the FTC act. 92 F.T.C. at 781, n.4

United States seeking review of the court of appeals judgment. Sup. Ct. No. 82-328. That petition is still pending. After it was filed, the Commission and respondent undertook negotiations looking to a mutually acceptable disposition of the important questions of competitive policy raised in this matter. That process has culminated in the proposed order attached hereto, which the Commission is contemplating entering as soon as it reacquires jurisdiction over this case.[2] To that end, the Commission is making the text of the proposed order available for public comment for 30 days.[3]

The Commission has determined to settle the pending litigation that resulted from its decision and order of November 7, 1978 because its prior decision herein does not set forth a satisfactory, cost-based standard for predation under Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Continue defense of that decision in the pending proceeding before the Supreme Court would therefore be inconsistent with the Commission's present view of the matter.

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[2] The Commission has no jurisdiction to change its prior order so long as the record in the case is before the courts on judicial review. The Commission's power to modify or set aside its order in whole or in part continues only "until the record in the proceeding has been filed in a court of appeals of the United States," 145 U.S.C. 45(b), (c). Thereafter, the Commission does not reacquire jurisdiction to alter, modify or set aside its order until all proceedings on judicial review are completed, including any proceedings on petition for a writ of certiorari in the Supreme Court, 15 U.S.C. 45(g). The Commission's invitation and consideration of public comment of the proposed settlement is not inconsistent with the court's exclusive jurisdiction because such action affects only the Commission's position in the litigation.

[3] A public comment period is not required by the Commission's rules, as this is neither a consent agreement terminating an administrative complaint pursuant to Rule 3.75 nor a modification of a final order pursuant to Rule 2.51. However, because of the importance of the issues involved in this matter, the Commission has chosen to seek public comment voluntarily.

Since the court of appeals' judgment was based on grounds to which the Commission no longer adheres, the Commission plans to request the Solicitor General to advise the Supreme Court that the petition for a writ of certiorari should be granted, and that the decision of the court of appeals should be vacated with instructions to remand the case to the Commission. Upon remand, the Commission proposes to enter the attached order in settlement of the litigation, and of the Commission's complaint against respondent.

The Commission is of the view that the standard of conduct it applied to Borden's competitive behavior is inconsistent with the purposes of Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act because it may discourage dominant firms from vigorously competing. Subsequent to its ruling in this case, the Commission held in *E.I. du Pont de Nemours & Co.*, 96 F.T.C. 653, 750-751 (1980):

> Antitrust policy wisely disfavors monopoly, but it also seeks to promote vigorous competitive behavior. Indeed, the essence of the competitive process is to induce firms to become more efficient and to pass the benefits of the efficiency along to consumers. That process would be ill-served by using antitrust to block hard, aggressive competition that is solidly based on efficiencies and growth opportunities, even if monopoly is a possible result. Such a view, we believe, is entirely consistent with the "superior skill, foresight and industry" exception in [*United States* v. *Aluminum Company of America*, 148 F.2d (C.A.2 1948)] and subsequently cases, for those decisions clearly indicate that monopoly may be lawfully created by superior competitive ability.

That standard informs the Commission's present view of this case.

A. PRODUCT DIFFERENTIATION

The Commission found that Borden had "manipulated"—*i.e.*, reduced—the premium price that consumer preference had conferred upon its brand, in those areas of the national market in which it faced direct competition. In short, Borden reduced prices in order to defend its market share in response to a competitive challenge. The Commission found Borden's price reductions to be unlawful in part because, in the Commission's view, the ReaLemon trademark and the premium price it commanded reflected a form of "spurious product differentiation." 92 F.T.C. at 805. The Commission believed that processed lemon juices are not substantially different, that (apart from advertising cost advantages) producers of processed lemon juice are equally efficient, and that consumer preferences for the ReaLemon brand constituted a significant barrier to entry protecting Borden's monopoly position. 92 F.T.C. at 800, 695, 721.

The Commission recognizes that brand preferences and advertising costs may affect the costs of entry. The conditions of entry, in turn, are one of several factors that may affect the appropriate standard for determining whether any given price reduction is predatory—although, as we discuss below, experts are far from agreed on the question of what sort of standard to use or how such effects ought to be taken into account. Compare, e.g., P. Joskow & A. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 *Yale L.J.* 213, 249 (1979), with Y. Bronsen, *Concentration and Public Policy* 216-65 (1982). Among the factors that have been suggested as relevant to this inquiry are the extent of any differences between the promotional costs faced by later entrants and those faced by the dominant firm when it originally established its brand (see R. Schmalansee, *Product Differentiation Advantages of Pioneering Brands*, 72 *Am. Econ. Rev.* 349

(1982)); and the extent to which promotional expenditures represent sunk costs which could not be recovered by an unsuccessful entrant (cf. W. Baumol & R. Willing, *Fixed Costs, Sunk Costs, Entry Barriers, and Sustainability of Monopoly*, 96 *Q.J. Econ.* 405, 418-19 (1981).

However, the Commission did not analyze brand preferences and promotional costs as neutral factors affecting the conditions of entry, and thereby affecting the appropriate predation standard.[4] Instead, the Commission apparently viewed product differentiation as something pernicious in and of itself, which rendered suspect any attempt by Borden to respond to Golden Crown's competition by reducing price. In the commission's view, the fact that Borden's price cuts were made from the position of strength reflected by its price premium was itself enough to remove those price cuts from the category of "ordinary marketing methods available to all," and turn them instead into illegal predatory pricing. 92 F.T.C. at 803.

This approach not only unduly limits the ability of an established brand to compete by reducing prices, it also misperceives the nature of product differentiation and of the price premiums reflecting consumer familiarity with or acceptance of an established brand. While such premiums may indeed affect the conditions of entry, they also serve important competitive functions. An integral part of the competitive process—i.e., the process by which consumers select the mix of goods and services they most prefer—is the cost to consumers of becoming informed about a brand's advantages and availability. An established brand is one which has invested capital to reduce those costs, having acquainted most

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[4] Thus, while Commissioner Pitofsky believed that entry conditions justified application of an average total cost rather than an average variable cost standard, he had to concur separately to express that view, 92. FTC. at 817-832.

consumers with the product and its quality. The premium accruing to a brand name is thus a form of good will, whose value can be measured by the strength of consumers' preference for that brand. See, e.g., T. Nagle, *Do Advertising-Profitability Studies Really Show that Advertising Creates a Barrier to Entry?*, 24 *J.L. & Econ.* 333 (1981). Federal statutory policy with respect to trademarks expressly encourages and protects this form of good will. 15 U.S.C. 1167.

In this case, consumers were willing to pay a premium price in reliance upon Borden's familiar and successfully advertised trademark. That willingness reflected a marketplace judgment about interbrand competition, which "is the primary concern of antitrust law." *Continental TV* v. *GTE Sylvania*, 433 U.S. 36, 52, n.14 (1977). From an economic standpoint, cost efficiencies achieved with respect to the image value of a successfully advertised product are in many ways similar to cost efficiencies achieved in any other aspect of its production and distribution. Professor Scherer, in the passage adopted by the Commission (92 F.T.C. at 804), conceded as much.[5]

The Commission's decision did not adequately weigh the competitive advantages of Borden's product differ-

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[5] The Commission had relied upon Profesor Scherer's observation that while an image advantage permitting the maintenance of a price premium is like a unit cost advantage, temporary price cutting that excludes " 'producers handicapped only by an inferior brand image is socially undesirable.' " Scherer, *Predatory Pricing and the Sherman Act:* A Comment, 89 *Harv. L. Rev.* 869, 889 (1976). Professor Scherer's disapproval of image advantage exclusionary pricing, however, did not rest on economic factors. He observed in a sentence omitted from the passage quoted by the Commission that "[a]ssessing the social efficacy of such cases calls for strong non-economic value judgments." *Id.* The Commission agrees with Judge Kennedy's dissent in the court of appeals (674 F. 2d at 519, n.2) that social values unrelated to the protecting of competition are not a concern of tribunals acting under the Sherman Act.

entiation and antitrust law's promotion of interbrand competition. Instead, it assumed that consumer preference for Borden necessarily constituted an *anticompetitive* barrier protecting Borden's monopoly position from erosion by new entrants. Moreover, it therefore barred Borden from reducing its prices in competitive markets until its monopoly position had disappeared, *i.e.*, until enough consumers were buying competing brands to neutralize Borden's brand advantage. 92 F.T.C. 805-809, 832-833. This indefinite restraint on price competition, as Commissioner Clanton observed, "threatens to prolong unduly the interval over which consumers must pay higher prices and during which less efficient firms are sheltered from competition." 92 F.T.C. at 814. Because the Commission's analysis of Borden's brand advantage appears to be inconsistent with the purposes of the antitrust laws to promote vigorous competition, as recognized in its *du Pont* decision, the Commission can no longer defend this aspect of its opinion.

B. GEOGRAPHIC PRICE DIFFERENTIATION

The Commission also considers the treatment of geographic price discrimination in its prior opinion to be unsound. The opinion recognized (92 F.T.C. 804, n.38*) that "price discrimination among different geographic markets does not of itself constitute a violation of Section 2 of the Sherman Act or Section 5 of the FTC Act." The fact that Borden may have charged lower prices than elsewhere to retailers in areas where it faced competition could not produce competitive injury to those retailers, or to Borden's customers located outside those markets, because the former do not compete with the latter. Nor can such price differences have caused any injury to competing producers of lemon juice within those markets, at least absent proof that Borden was subsidizing its losses in competitive markets with its profits in monopoly markets. Although the Commission

stated in its opinion that Borden in part subsidized its price cuts with continued monopoly pricing elsewhere 92 F.T.C. at 802, as Judge Kennedy observed (674 F.2d at 519), the Commission made no specific finding to support its statement; it presumed what had not been proved.

The only effect of Borden's geographic price differences was to confront Borden's competitors with prices lower than Borden charged in markets where they did not compete. Any losses they suffered, therefore, resulted not from "discrimination," but from the absolute level of Borden's prices in the markets where they actually competed. When a dominant firm like Borden, that operates nationally, is threatened with loss of market share by the aggressive price rivalry of competitors, common sense and sound antitrust policy should recognize, as did Commissioners Pitofsky and Clanton, that the firm's local price reductions can be "a wholesome part of the competitive process" (92 F.T.C. at 818-822). Otherwise such firms would be required to maintain uniform monopoly prices nationwide in order to protect competitors, a paradoxical and anticompetitive result. Thus, in the Commission's present view, only if Borden's responsive pricing in locally competitive markets had been below lawfully permissible cost levels, would there have been a basis for finding unlawful monopolization.[6]

C. RESPONDENT'S INTENT

The Commission's opinion condemned Borden's "pricing very close to average variable cost" (92 F.T.C. 804) as "exclusionary in intent and effect" *(id.)* and therefore unlawful because of Borden's monopoly market share. See *United States* v. *Griffith*, 334 U.S. 100,

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[6] The Commission did not, in finding liability, invoke the Robinson-Patman Act or the reasoning of *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967).

107 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809, 811 814 (1946); *United States* v. *Grinnel Corp.*, 384 U.S. 563 (1966). This condemnation, however, is merely a conclusory characterization. Such pricing should be legally "exclusionary" only if it is at sub-cost levels that Section 2 condemns as predatory. Borden's intent to compete in defense of its market share was to be expected, and, not surprisingly, was clearly shown by its marketing plans. In *du Pont*, however, (96 F.T.C. at 727) the Commission held that efforts to win every sale are not enough to evidence an intent to exclude in the sense condemned by *Griffith*, *American Tobacco Co.* and *Grinnel*. The line between "intent to exclude" and "intent to acquire market share" is too attenuated to be reliably drawn solely from documentary evidence of management's state-of-mind. Executives on the front line of the competitive struggle are notoriously prone to overzealous hyperbole, and "[a]fter all, competition consists of winning business from rivals." *MCI Communication Corporation, et al.* v. *American Telephone and Telegraph Company*, 1982-83 Trade Cases ¶ 65, 137 (7th Cir. January 12, 1983), at 71,374. See also Posner, *Antitrust Law: An Economic Perspective*, 189-190 (1976); Areeda, *1982 Supplement to Antitrust Law*. ¶ 714.2c. The proof of Borden's intent reflects these uncertainties. Thus, as Commissioner Clanton and Pitofsky noted (92 F.T.C. at 814, 818), it is actual pricing behavior, rather than executive plans, that constitute the best evidence as to whether or not Borden had an intent to exclude. Judge Kennedy was correct, therefore when she observed: "Borden surely meant to obtain as much of the reconstituted lemon juice market as it could, but that is the very essence of normal competition, a goal that we approve even for a monopolist" (Pet. App 35a). As noted in the *du Pont* case, *supra*, this is a view now shared by the Commission.

D. COMPARISON WITH RIVAL'S COSTS

The court of appeals read the Commission's opinion as condemning price manipulation by a monopolist if such conduct forces its *competitors* to price below *their own* average variable cost. 674 F.2d at 515-516. This interpretation cannot be squared with the competitive process protected by the Sherman Act. That statute protects price competition because it is "the central nervous system of the economy." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). In effect, the court of appeals rule would require dominant firms to raise a price umbrella over competitors by maintaining minimum prices set with reference to their competitors' costs rather than their own.

Such a rule would turn the competitive process upside down by requiring dominant firms to maintain prices at monopoly levels, and by depriving consumers of the benefits of price competition. Price competition induces firms to maximum their profits by achieving cost efficiencies in production, marketing (including advertising), and distribution. Lower costs enable them to price at levels which will capture marekt share from their rivals. If firms must price with reference to their rivals' costs, the entire mechanism by which competitive pricing produces cost efficiency is destroyed. The reasons are explained in Commissioner Pitofsky's concurring opinion (92 F.T.C. at 821):

> A rule that prevents a monopolist from cutting price in response to new or augmented competition requires the monopolist to wait passively as small, perhaps less efficient arrivals take business away. During this time, consumers who continue to buy from the monopolist are paying higher prices because the law prevents the monopolist from pursuing its own best business interest by instituting price reductions that may be possible due to its efficiency. New entrants protected by a legally man-

> dated umbrella price may themselves charge higher prices than would otherwise be the case—sufficiently below the monopolist price to take some of its business but sufficiently high to make supra-competitive profits themselves. Pursuing this scenario, the whole industry may become economically inefficient for the period of time the administered price umbrella is in effect. Finally, a legally mandated umbrella price generates extremely burdensome administrative problems in supervising the monopolist's prices policies.

The court of appeals' approval of umbrella pricing is directly attributable to the ambiguities in the Commission's opinion. The Commission expressly stated that "the ALJ did not find that 'ReaLemon' was sold below cost, nor do we * * *" (92 F.T.C. at 804).[7] On the other hand, the Commission also stated that "while it does not appear that ReaLemon was sold below average variable cost, at least not as a consistent course of conduct, it does appear that Borden sold below average total cost, when fixed costs are added in" (92 F.T.C. at 807). The Commission then indicated that to the extent Borden priced below average total cost, it violated the rule against this practice proposed by Professor Posner[8] (92 F.T.C. at 804, 805). But it never expressly adopted this rule as a basis of decision. As the court of appeals correctly observed (678 F.2d at 515), the Commission made no choice between average variable and average total cost rules. Instead, it based its decision on a determination that "in any event, the effect of Borden's spurious product differentiation, making it necessary for competitors to sell considerably below ReaLemon, created a circumstance where even prices

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[7] The Commission apparently was referring to the absence of pricing below average variable cost. It agreed with the ALJ's findings in this respect (92 F.T.C. 753-754, and 800).

[8] R. Posner, Antitrust Law: An Economic Perspective 168-193 (1976).

above marginal cost could, as the record indicates (I.D. 194-200), be predatory in the sense that even equally efficient competitors could be driven from the market." 92 F.T.C. at 805. Thus, the Commission's holding did not at all rest on a pricing standard based on the seller's costs, but instead, on the costs of the seller's competitors. The Commission's holding invited the umbrella pricing rule, based on "manipulation" of Borden's premium price, that was adopted by the court of appeals. 674 F.2d 515-516.

In a subsequent decision, another panel of the Sixth Circuit, distinguishing the Borden case, has stated that "Borden was found to be predatorially pricing by setting its prices below average total cost." *Richter Concrete Corp. et al.* v. *Hilltop Concrete Corp., et al.*, 1982-83 Trade Cas. ¶ 65,003, at 70,591, n.6 (1982). The *Richter* panel, however, was of the view that mere proof of pricing below average total cost is insufficient to support an inference of predatory pricing. Instead, it read the *Borden* decision as condemning Borden's below cost pricing because of presence of other factors as well: Borden's geographic price discrimination; its 90% market share; the high entry barrier due to consumer preference to ReaLemon; and Borden's subjective intent to eliminate competition. *Id.* As we have shown above, however, the Commission's discussion of these additional factors, either jointly or severally, did not necessarily establish a predatory intent to foreclose competition within the meaning of Section 2. Thus, insofar as the court's affirmance of the Commission's decision might be read as resting upon Borden's pricing below average total cost, the Commission's prior opinion failed to set forth a reasoned explanation of why such pricing is improper.[9]

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[9] We note also that the Sixth Circuit's subsequent explanation of *Borden* in *Richter* appears to be more consistent with Commissioner Pitofsky's concurring opinion, than with the Commis-

E. CONCLUSION

The proper standard for determining predatory pricing continues to be a subject of debate among economists and in the courts. See J. Brodley & G. Hay, *Predatory Pricing: Competing Economic Theories in the Evolution of Legal Standards*, 66 Cornell L. Rev. 738, 740 (1981). The courts that have considered the matter have looked to some measure of marginal or incremental costs because "when a price floor is set substantially *above* marginal or incremental costs, a price umbrella is created which allows less efficient rivals to remain in the market sheltered from full price competition." *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, *supra*, at 71,378 (*emphasis in original*). *Accord*, *Northeastern Telephone Co.* v. *AT&T*, 651 F.2d 76, 87-90. Most courts have used average variable cost as a factor against which to test an alleged predator's pricing levels, but almost always have expressed a willingness to consider other factors. *MCI Communications Corp.*, *supra*, at 71,379-71,382. See *e.g.*, *Chillicothe Sand & Gravel Co.* v. *Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980). Some movement away from emphasis on short-run marginal costs has now appeared in the decisions. E.g., *MCI Communications Inc.* v. *American Telephone & Telegraph Co.*, *supra*; *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 58 (1982). See Note, *Predatory Pricing: The Retreat from the AVC rule and the Search for a Practical Alternative*, *22 B.C.L. Rev.* 467 (1981). Because all incremental costs vary in the long run, the debate has increasingly focused on what costs are to be

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sion's ruling. The Commission expressed no agreement with Commissioner Pitofsky's proposal that the average total cost test be adopted as the rule of decision in this case. His concurrence was apparently necessary because the majority was not adopting such a test.

attributed to a particular operation, and over what period of time. There has been a deep concern for the goal of developing practically administrable standards that can be used by courts, counsel and businessmen. See *Areeda, 1982 Supplement to Antitrust Law*, ¶¶ 710'-721'.

For the reasons given above, the Commission's discussion of these issues in its earlier opinion has not clarified them; nor has it articulated reasons consistent with sound antitrust policy for finding Borden liable for monopolization under Section 2 of the Sherman Act. The Commission therefore believes that the public interest would not be served by defending its earlier opinion in the Supreme Court. Instead, the Commission has provisionally agreed to a settlement of the litigation, and proposes to modify the order to prohibit Borden from pricing its ReaLemon product below its variable costs in any sales district. "Variable costs" are defined as all costs which Borden could have chosen not to incur during the relevant time period. The relevant time period will consist of all consecutive fiscal quarters in which Borden's prices failed to cover its total costs, and thus will vary with the duration of any challenged price reduction.

The Commission is not here deciding that the standard imposed by this order is necessarily the appropriate standard in all instances for finding a violation of the antitrust laws as an initial matter.[10] Nor are we deciding that this order is necessarily the exclusive model for the relief to be granted in future predatory

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[10] The order therefore should not be read as approving all future pricing activity by Borden which does not violate the order, or as attempting to immunize such pricing from any future antitrust challenge. The fact that certain conduct has not been prohibited by a particular Commission order does not mean that that conduct could not still violate the general prohibitions of the antitrust laws.

pricing cases. The proposed order reflects the particular circumstances of this case, including the fact of a Commission decision based on grounds which can no longer be defended, and the difficulty of re-opening this now stale record or re-litigating the case under a more appropriate standard of liability. The Commission believes that this order represents an appropriate settlement of the pending litigation.

BENJAMIN I. BERMAN,
Acting Secretary.

SEPARATE STATEMENT OF COMMISSIONER DAVID A. CLANTON

While I join in the Commission's decision today, I feel compelled to correct some misimpressions about that decision that could be created by the separate statements of my fellow Commissioners. Focusing on the fact that the proposed settlement only prohibits Borden from pricing below variable costs, Commissioner Bailey, for example, states that the Commission is now endorsing this standard as the appropriate one for judging antitrust liability as an initial matter.

Clearly, that is not what the Commission has decided. In fact, I share many of Commissioner Bailey's concerns about adopting such a standard as the sole test of antitrust liability,* as would (I believe) my fellow Commissioners in the majority. This is why the Commission did not make such a decision, and why the final paragraph of the Commission's Statement explicitly disclaims any such decision. Similarly, as that paragraph also makes abundantly clear, we are not deciding that the proposed settlement represents the appropriate remedial order to enter in every case where antitrust liability has already been found. While some in the private sector may wish to ignore those disclaimers, and persist

*See my concurring opinion in the original Borden decision, 92 F.T.C. at 813.

in the belief that the Commission nevertheless has made such a decision, I can at least point out that they do so at their own peril.

The reason the Commission is provisionally accepting the proposed settlement has to do with the alternatives available at this stage of the litigation. One option, asking that the case be remanded to the Commission, is impractical due to the staleness of the record and the difficulties and expense of a new trial. Another option, defending the Commission's original decision before the Supreme Court, would also require us to defend the Commission's original order. That order prohibited Borden from pricing "below cost" without even attempting to define which costs were included in the relevant standard—and, if that were not enough, added a similarly undefined prohibition against charging "unreasonably low prices."** The third option, of course, is to accept the proposed settlement.

Thus, the comments that will be most useful to the Commission will be those that compare the proposed order with the possible alternatives, and make a recommendation on that basis. To assist in those comments, I have attached the order currently pending in this case as an appendix to this statement.

CURRENT ORDER (92 F.T.C. AT 832-33)

It is ordered, that Borden, Inc., and its successors and assigns, officers, agents, representatives and employees, directly or indirectly, or through any corpora-

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**To avoid creating the same misimpression I objected to earlier, I should point out that Commissioners Pertschuk's and Bailey's preference for defending the original order does *not* mean that they endorse the terms of that order as the appropriate standard for determining antitrust liability as an initial matter, or even as the appropriate model for relief in future predation cases where liability is found. The same understanding should be brought to the Commission's acceptance of the terms of the proposed settlement.

tion, subsidiary, affiliate, division or other device, in connection with the production, marketing and sale of processed lemon juice in or affecting commerce, as "commerce" is defined in the Federal Trade Commision Act, shall forthwith cease and desist from:

(1) Granting price reductions, directly or indirectly, which result in different net prices among Borden's ReaLemon customers, whether or not such customers compete in the same geographic area, which differences in price are not attributable to differing costs of manufacture, sale or delivery, and the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice;

(2) Selling ReaLemon lemon juice below its cost or at reasonably low prices, the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice;

(3) Granting promotional allowances or payments of any kind for customers' promotional services, the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice.

It is further ordered, that Borden, Inc., shall within sixty (60) days from the date this order becomes final, and every year thereafter for a period of ten (10) years, submit a detailed written report of its actions, plans and progress in complying with the provisions of this order, and fulfilling its objectives.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK CONCERNING PROPOSED ORDER MODIFICATION IN BORDEN, INC.

Docket No. 8978

FEBRUARY 25, 1983.

A majority of the Commission has voted to take the extraordinary step of weakening an order on the Commission's own initiative, after the order has been upheld by the court of appeals. The agreement adopted by the majority is a retreat to an order standard that is extremely lenient in allowing future predation by a monopolist, unduly ambiguous, and at odds with sound reasoning in recent court opinions. Moreover in order to implement this agreement, the Commission in essence is asking the Supreme Court—highly improperly in my view—to take cases that have long passed from an agency's jurisdiction and return them so that a new administration can re-decide them to apply its prevailing philosophy retroactively as well as prospectively. I cannot support, for proponents of any view, this approach to the administration of justice.

The majority seeks to modify the current *Borden* order in four principal ways: (1) changing the prohibition on below cost pricing to prohibit only pricing below "variable costs"; (2) dropping any prohibition of discriminatory pricing by geographic area; (3) dropping the provision on anticompetitive promotional allowances; and (4) including a 7 year sunset provision. What's left of the Commission's order is a cryptic provision prohibiting pricing below "variable costs," plus a novel definition of variable costs as those costs which are "avoidable, consistent with prudent business practices." This rubric actually changes the conventional concept of variable costs altogether and opens the door for Borden to construe it as narrowly as possible.

Before I discuss the legal and economic shortcomings as well as the administrative problems in the order, it is worthwhile to describe the steps which led to this "settlement." The Commission's order in *Borden* was affirmed by the court of appeals in early 1982. Borden petitioned for certiorari to the Supreme Court in August 1982, and the Commission's response was due to the Court in 30 days. Rather than oppose the petition as would have been the normal case, the Justice Department, on the Commission's behalf, asked for a series of extensions to accommodate "Settlement" discussions. During this period of negotiations, the draft orders exchanged between our staff and Borden grew steadily weaker (weaker than Borden originally proposed in fact) until the final agreement was reached. We have received no staff analysis of or recommendations on the legal and economic issues in the case, though the Bureau of Competition has forwarded a narrowly focused analysis of compliance problems in interpreting and enforcing the agreement. During this period, the make-up of the Commission changed so as to produce majority support for this agreement. In short, this settlement was not the result of a compromise to avoid further litigation, producing a compromise applicable only to this case, but a decision to change the order on policy grounds.

The *Borden* case presents a good example of why there is a rule against predatory pricing. The record in the case showed Borden was a monopolist with a 90% market share. While one brand of reconstituted lemon juice is for all practical purposes, virtually identical with any other, the ReaLemon trademark, which Borden promoted heavily, constituted a long-standing barrier to entry. Borden's rivals and retailers alike recognized that as a result of this advantage, Borden was able to charge up to 30% more than equally efficient competitors and remain competitive. Borden

priced differently in different geographic areas. It charged monopoly prices in areas where it faced no real market challenge and used selective price cuts to discipline or threaten competition in areas where it did face a competitive threat. Borden's internal documents reflected an intention to price selectively so as to eliminate its major rival in many areas—Golden Crown. This combination of factors makes a particularly strong case for concluding that Borden had crossed over the line from healthy aggressive pricing to anticompetitive predation likely to maintain the concentrated lemon juice market as the province of an almost total monopolist.

In articulating the standard of liability, the Commission quite properly did not focus solely on a comparison of prices and costs but considered other factors, including Borden's monopolist position, the difficulty of entry caused by its brand name advantage, the pattern of geographic price discrimination, and Borden's predatory intent. The Commission also clearly found that Borden had sold below average total costs. (92 F.T.C. at 807) Although the Commission was not unanimous in stating a standard for liability, it was unanimous in concluding Borden had engaged in predatory pricing. I do not believe many courts would quarrel with the essential holding that pricing at or near average variable costs by a monopolist, in a market with significant barriers to entry, and coupled with geographic price discrimination and predatory intent constitutes a violation of both Section 2 of the Sherman Act and Section 5 of the FTC Act. As the majority points out, it is true that the Commission did not establish any single cost-based standard for predation. But doing so would have been exceedingly difficult given the lack of legal or economic consensus in this area; it also would have been unnecessary, given that the evidence showed Borden violated even a very conservative standard of predation.

I would not defend each and every sentence in the Commission's 1978 opinion. If it were to be written today, with the benefit of further thinking and caselaw on predation, I would advocate that some passages be written differently. (I would venture, however, that this is the case for almost all opinions and all Commissioners. The conventional route for refining past opinions is to restate the principles in the next one.) While I concede that the court of appeals opinion reviewing the case went too far in claiming that the Commission's standard was based on *competitors'* costs (674 F.2d at 515-516), the court clarified its holding in a subsequent opinion.[11]

The Commission's statement also criticizes the opinion in *Borden* by suggesting that the opinion condemned product differentiation through advertising as "something pernicious in and of itself." (Majority statement at 5) I do not think that is a fair statement of the Commision's position in *Borden*. Advertising was significant in *Borden* because it created a barrier to entry, a view that has been supported by the courts.[12] Any language in the opinion which may suggest otherwise is not my view or, to the best of my knowledge, the view of the Commisioners who joined the opinion. While the advertising may have had some positive effects as well, its antitrust significance here is that by serving to erect a barrier to market entry by firms producing an indistinguishable product by equally efficient methods, it fostered a situation in which unassisted market forces could not readily redress any attempts by Borden to

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[11] The Sixth Circuit characterized its Borden holding in Richter Concrete Corp. v. Hilltop Concrete Corp., 1982-83 Trade Cas. ¶ 65,003 (1982). "Borden was found to be predatorially pricing by setting its prices below average total cost." *Id.* at 70,591, n.6.

[12] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d. 263, 287 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

exploit its monopoly power. And, the record in this case is clear that Borden did engage, successfully, in such efforts.

There is not yet a consensus about the proper standard for predation, but one point is clear: The reasoned opinions point away from the narrow, virtually impossible to meet average variable cost standard initially proposed by Professors Areeda and Turner in 1975. As Professors Brodley and Hay have pointed out, this standard, while appearing to offer a simple formulation consistent with economically efficient resource allocation, has the distinct disadvantage (for small firms trying to break into a market) that "it holds dominant firm pricing per se legal."[13] Consequently, virtually every recent appellate decision has declined to adopt a strict average variable cost rule for all situations.[14] While the

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[13] J. Brodley and G. Hay, "Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards," 66 Cornell L. Rev. 738, 793 (1981). As Brodley and Hay point out, the Areeda-Turner rule led to several difficulties. First, cost determination proved to be exceedingly complex in adjudication. Second, some adjustments had to be made in using the average variable cost as a surrogate for marginal cost to remain consistent with the economic theory of the rule itself. Third, several writers have rejected the Areeda-Turner rule even on efficiency grounds. Finally, the rule made it extremely difficult for plaintiffs to prove a violation, *Id.* at 768. Professor Williamson has called the rule "a defendant's paradise." Predatory Pricing: A Strategic and Welfare Analysis," 87 Yale L.J. 284, 305 (1977). For an excellent review of trends in predation law, *see* J. Hurwitz and W. Kovacic, "Judicial Analysis of Predation: The Emerging Trends," 35 Vanderbilt L. Rev. 63 (January 1982).

[14] The Ninth Circuit has recently stated in some instances pricing above average total costs could be predatory. Transamerica Computer Co., Inc. v. I.B.M. Corp., [1983] TRADE REG. REP. (CCH) ¶ 65,218 (9th Cir.). In Northeastern Tel. Co. v. Am. Tel. & Tel. Co., 651 F. 2d 767, 788 (2d Cir. 1981), the Second Circuit said "the relationship between a firms prices and its marginal costs provides the best single determinant of

Areeda-Turner rule is overly lenient as a standard for predation, the agreement adopted by the majority of the Commision, though using some terminology borrowed from Areeda-Turner, sets out an even more permissive standard—one that would mean a violation in this or any other industry would rarely occur and even more rarely could be proven.

In understanding the Commission's standard, it is important to note that, though the term "variable costs" is used, the standard is far from the standard conception of the term. The revised order actually prohibits *total* variable costs from exceeding total revenues in a single quarter in a single sales district. This is a very different idea from prohibiting pricing of products below the *average* variable cost per unit (a surrogate for marginal cost), and it leads to easy avoidance of the standard.

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predatory pricing" but applied this presumption only to a "run of the mill case." The Fifth Circuit in International Air Ind., Inc. v. American Excelsior Co., 517 F.2d 714, 724 (1978), required a showing of below average variable cost pricing or pricing below the short-run profit maximizing price when barriers to entry make such predation worthwhile. The Seventh Circuit in Chillicothe Sand & Gravel v. Martin Marietta Corp., 615 F. 2d 427, 432 (1980), viewed average variable cost as a useful factor but expressly indicated willingness to "consider the presence of other factors." The Eighth Circuit in Superturf, Inc. V. Monsanto Co., 660 F. 2d 1275, 1281 (1981), expressly noted that a monopolist who prices above average variable cost "may still be held to have engaged in a predatory act." The Ninth Circuit in Cal. Computer Products v. Intern. Business Machines, 613 F.2d 727, 743 (1979), noted "that refinement of the marginal or average variable cost test will be necessary as future cases arise," and expressly declined to "foreclose the possibility that a monopolist who reduces prices to some point above marginal or average variable cost might still be held to have engaged in a predatory act because of other aspects of its conduct." The Tenth Circuit in Pac. Eng. & Prod. Co. of Nev. v. Kerr-McGee Corp., 551 F. 2d 790, 797, cert. denied, 434 U.S. 879 (1977), found average variable costs to be "extremely beneficial," but nevertheless refused to base its test for predation solely on cost, and indicated it would look to other factors as well.

For example, in a single sales district (there are 22 in the country) Borden could price very low in some cities, far below avarage variable costs, while compensating by selling at monopoly prices elsewhere in the district. Second, Borden could sell products from a very profitable area at selectively low prices into a district where a new entrant was trying to break in. The lower prices for these sales would reduce revenue for the district but not enough to violate the standard. In short, the idea seems to be that a potential predator must obey the law on *average*, rather than in particular situations. This novel approach is analogous to a speeder pleading with the highway patrolman that he has driven under 55 on average—an argument no doubt herefelt by the speeder but rarely recognized by the law.

The second difference between the Commission's "variable cost" idea and the conventional notion of variable costs is that, 'variable" in the agreement actually means "avoidable" by Borden and only then when avoiding expenses is consistent with "prudent business practice." What this will come to mean in real life is subject to much speculation, but one thing seems certain: much of Borden's advertising and labor expenses—costs Areeda and Turner have presumptively included in variable costs—will be excluded in Borden's own calculations on the grounds that it was "imprudent" to cancel them. Indeed, it would be hard for this Commission, or any other "outsider" to disagree with Borden's own experts and executives about what is prudent and avoidable for Borden.

I will not discuss in detail other substantive and administrative problems with the order, with one exception—the seven year sunset provision. The original *Borden* order, as is typically the case, was not limited in duration. Our rules provide that respondents may petition to modify orders based on changed conditions, but a ban on predatory practices or any other practice

found to violate Section 5 has traditionally been permanent. One irony of the sunset is that because of the leniency of the Commission's order—much more permissive than the current state of the law—Borden is "subjected" to a less stringent standard than binds other monopolists until the sunset provision expires. If the Commission tries to sue Borden on the basis of *another* standard (as the Commission's statement suggests in fn. 10) Borden will no doubt argue that it was conforming to the Commission's order, that the Commission never would incorporate in any order a conduct standard lower than the recognized threshold of legality, and any transgression of any more restrictive standard was done in good faith. Under these circumstances, I am surprised Borden did not hold out for a permanent order.

The Commission now asks the Supreme Court to grant an extension for public comment on this agreement. While I surely support the opportunity for the public to comment, I respectfully believe that the Court should deny the Commission's request. A majority of the Commission is willing to circumvent the lengthy litigation in this matter in order to substitute a legal and policy approach held by the current administration. While I respect the right of the majority to decide the next opinion and to submit its views on that opinion to a court of appeals, I sincerely hope that the Court will not countenance what is in effect a dismissal of this matter by granting the Commission's request. Regardless of the legal merits, I consider it unseemly for this Commission to ask the Supreme Court to help it dismiss a case and vacate existing opinions in the matter five years after the case has left the Commission's jurisdiction, simply to accommodate the views of the administration in power. If accepted, this request threatens to set an unwise precedent for all agencies which, having undergone a change of philosophy and administra-

tion want to undo the efforts of past administrations in matters that, without the Supreme Court's aid, are no longer within its grasp.

The majority is doing much more by accepting this agreement than quibbling about language in the Commission's or Court of Appeals' opinions. It is trying to point predation law in a different direction—toward a solely cost-based standard that will be infrequently violated in real life and even less frequently proved. While it may appeal to some as embodying the height of economic rationality, as a practical matter, the standard in this order would take the Commission out of the business of policing predation.

DISSENTING STATEMENT OF COMMISSIONER PATRICIA P. BAILEY ON PROPOSED ORDER IN BORDEN INC., DOCKET 8978

I cannot agree with many of the policy pronouncements in the majority's statement, and I have only slight hope that the public comment period will resolve my concerns about the wisdom and efficacy of this consent.

Were I deciding *Borden* today, I might well write a different opinion from the one of four years ago (in which I was not a participant), because of both my own views and the evolving state of the law. However, the 1978 opinion is by no means susceptible of the majority's criticism that it embraces a "standard of conduct [which is] inconsistent with the purposes of Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act." (Majority Statement, p. 3). On the contrary, *Borden*, whatever its arguable deficiencies, is within the mainstream of judicial and academic opinion which looks at a variety of factors, in addition to "below cost" pricing, to evaluate predatory intent and dangerous probability of success.

The evil of *Borden*, it seems, is that the case "does not set forth a satisfactory cost-based standard for predation." (*Id.*) Judging from this language and the proposed consent, the majority feels that a variable cost standard, and only a variable cost standard, should determine liability on a predation theory. This flies in the face of every[15] recent circuit court decision on predatory pricing and the Commission's own recent examination of dominant firm behavior.

Since 1975 there has been "a virtual explosion in the legal and economic literature dealing with predatory pricing." J. Brodley & G. Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 Cornell L. Rev. 738, 740 (1981). At least nine different economic theories for detecting predation have been advanced,[16] and the courts have been

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[15] The majority opinion in MCI Communications Corp. v. American Tel. & Tel. Co., 1982-83 Trade Cas. ¶ 65,137 (7th Cir. 1983) comes close to placing definitive reliance on a cost standard; however the standard referred to, long-run incremental cost, is considerably more inclusive than a variable cost standard, and particularly the variable cost standard proposed by the majority of this Commission.

[16] The seminal discussion recommended a short-run marginal cost pricing rule using average variable cost as a practical surrogate for marginal cost. P. Areeda & D. Turner, Predatory Pricing and Related Practices of Section 2 Under the Sherman Act, 88 Harv. L. Rev. 697 (1975). This proposal was challenged for disregarding the risk that a dominant firm can successfully pursue a strategy of sacrificing short-term profit for long-term benefits in order to exclude actual or threatened competition. F. Scherer, Predatory Pricing and the Sherman Act: A Comment, 89 Harv. L. Rev. 869 (1976) (offering an economic model for testing cost based rules and suggesting a broad rule-of reason approach). Other commentators proposed long-run pricing rules that emphasized different cost factors. R. Posner, Antitrust Law: An Economic Perspective, 184-196 (1976) (presumptively condemning sales below average total cost with intent to exclude a competitor); P. Joskow & A. Klevorick, A Framework for Analyzing Predatory Pricing Policy. 89 Yale L.J. 213 (1979)

both selective and idiomatic in applying these tests.[17] However, the circuits are united in refusal to find that prices above average variable cost but below average total cost are conclusively lawful regardless of market conditions.[18] Rather, each case has indicated that pricing above average variable cost but below average total

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(proposing a two-tier test: only if monopolistic conditions exist in the market may pricing below the average variable cost be conclusively illegal, or pricing below average total cost be presumptively illegal under specified conditions). Other economists recommend approaches focusing on output changes or the timing of price cuts. O. Williamson, Predatory Pricing, a Strategic and Welfare Analysis, 87 Yale L.J. 284 (1977) (barring dominant firms from expanding output or selling below full cost to forestall entry): W. Baumol, Quasi-Permanence of Price Reductions: A Policy of Prevention of Predatory Pricing, 89 Yale L.J. 1 (1979) (barring price increases by a dominant firm for a specified period after its price cuts drive competitors from the market). Although not proposing a specific legal standard, two commentators have drawn attention to the prerequisites for successful entry-deterrance conduct. Salop, Strategic Entry Deterrance, 69 Am. Econ. Rev. 335 (1979); Spence, Entry, Capacity, Investment and Oligopolistic Pricing, 8 Bell J. Econ. 534 (1977). And finally, in fairness, I should note that at least one commentator has argued that there should be no standard at all, since no problem exists. R. Bork, The Antitrust Paradox 154 (1978).

[17] J. Hurwitz & W. Kovacic, Judicial Analysis of Predation: the Emerging Trends, 35 Vanderbilt L. Rev. 63 (1982).

[18] Most circuit courts have indicated that pri[illegible] above average total cost are presumptively, if not *per se*, legal. *See, e.g.*, Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427 (7th Cir. 1980); International Air Indus., Inc., v. American Excelsior Co., 517 F.2d 714, 723 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). *But see* Transamerica Computer Co., Inc. v. I.B.M. Corp., 1983-Trade Reg. Rep. (CCH) ¶ 65,218 (9th Cir.), holding that prices above average total cost are not presumptively legal. The circuits treat prices below average variable cost as presumptively illegal. *See, e.g.*, William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 652 F.2d 917, 939-940 (9th Cir. 1981), *cert. denied*, 81-2083, Oct. 4, 1982.

cost may be unlawful if other factors demonstrate predatory intent and injury to competition. Among the factors which have been mentioned are (1) market conditions which would thwart or aid monpolization, notably the height of entry barriers: *William Inglis & Sons* v. *ITT Continental Baking Co.*, *supra* at 933; *Northeastern Tel. Co.* v. *AT&T Co.*, 651 F.2d 76, 88-89 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1438 (1982); *International Air Industries, Inc.*, *supra*, 517 F.2d at 724; (2) independent proof of predatory intent: *SuperTurf Inc.* v. *Monsanto Co.*, 660 F.2d 1275 (8th Cir. 1981); *O. Hommel Co.* v. *Ferro Corp.*, 659 F.2d 340, 348-50 (3rd Cir. 1981), *cert. denied*, 102 S.Ct. 1711 (1982); *William Inglis & Sons Baking Co.*, *supra* at 942-43; *Chillocothe Sand & Gravel Co.*, *supra* at 433; (3) overall market capacity; *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 796-97 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 461 F. Supp. 410, 418-419 (N.D. Cal. 1978), *aff'd in part and rev'd in part*, 652 F.2d 917 (9th Cir. 1981). In addition, it is of course an antitrust truism that a firm with monopoly power may not be permitted the same latitude of conduct as its smaller rival. *U.S.* v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass 1953). Courts have consistently acknowledged the need to protect equally efficient competitors from abuses of monopoly power.

The *Borden* opinion, as I read it, states that the record contains proof of (1) monopoly power; (2) anticompetitive intent, manifest in Borden documents which identify the threat Golden Crown posed to ReaLemon and present a calculated strategy for blocking Golden Crown at key entry points in order eventually to regain

the pricing discretion of the pre-entry period;[19] (3) other conduct, which was arguably anticompetitive in the overall context, such as geographic price discrimination, local market saturation promotions, and high-impact regional advertising; (4) high barriers to entry to the form of ReaLemon's extraordinary brand image; (5) findings that Golden Crown lemon juice essentially matched ReaLemon in quality (thus indicating that the ReaLemon consumer franchise probably did not reflect current product superiority); and (6) findings that Golden Crown was as efficient as ReaLemon. With so many 'plus factors', particularly the evidence of noncompetitive market structure with vulnerable local competitors and direct evidence of predatory intent, surely the strictest possible cost standard is not required. The Commission did not, after all, find that Borden engaged in ephemeral price reductions, only slightly below its average total cost. Rather it found that Borden priced so far below ATC, for significant stretches of time, that it approached its average variable cost line—and across it if advertising expenses are counted as variable costs.[20] (see summary in Commissioner Pitofsky's concurring opinion, 92 FTC at 830-831).

The rule of reason approach in Borden—careful scrutiny of market structure, defendant's pricing levels and other conduct, available proof of intent and actual com-

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[19] In other words, Borden's price reductions were not simply a response to lower priced competition. They reflected an internal strategy to give up short-term profits in order to eliminate competition and recoup thereafter—the textbook definition in predation. P. Areeda and D. Turner, *supra*, at 693.

[20] The proposed order allows Borden to claim many advertising costs as fixed. I disagree with this provision. I see no unique circumstances in this case or industry which would warrant deviation from the normal practice, endorsed by Areeda and Turner, of presuming that advertising costs are variable. P. Areeda & Turner, III Antitrust Law, 173 (1978).

petitive consequences—is the approach I would bring to allegations of predation, and the one which I thought the Commission had reaffirmed in *E.I. DuPont de Nemours & Co.*, 96 F.T.C. 653, 745-46 (1980). I see no need to truncate predation analysis by attaching conclusive presumptions to comparisons of prices and costs. As Judge Wood has recently pointed out, economic and accounting evidence can be just as inexact and ambiguous as evidence of intent gleaned from documents and conduct. *MCI Communications Corp.* v. *American Tel. and Tel. Co.*, 1982-83 Trade Cas ¶ 65,137 (7th Cir., 1983) (dissent). The two weak components need each other.

I am also troubled by implications in the majority statement that geographic price discrimination is inherently procompetitive. This seems to me contrary to the letter and policy of the Robinson-Patman Act, which we should strive to reconcile with the other antitrust laws. While geographically selective price reductions can be a legitimate response to competition,[21] they can also be a highly effective monopolization strategy, as the Supreme Court has long recognized: If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 119 (1955).

See also U.S. v. *Grinnel Corp.*, 284 U.S. 563, 570, 576 (1966). Many of the current commentators on the predation issue have focussed on the effectiveness of a

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[21] See discussion by Commissioner Pitofsky in his concurring opinion in *Borden*, 92 FTC at 820-822.

multimarket strategy. *See, generally,* Salop, ed. *Strategy, Predation and Antitrust Analysis,* (1981); R. Posner, *Antitrust Law: An Economic Perspective,* 62-65, 176-80 (1976). Accordingly, I would not automatically approve geographic price discrimination, but would carefully examine it in light of other conduct to determine if other indicia of an attempt to lessen competition or monopolize are present.

If the majority are incorrect for their exclusive reliance on a cost standard as the determinant of liability, they are doubly incorrect in their choice of cost standard on which they rely. Even courts which have placed the most reliance on a cost-based standard for predation have looked to *average* variable costs. This order looks only to total variable costs, assessed, moreover, in multi-state markets. These markets are defined, not by competitive realities, but by the boundaries of Borden's sales districts. Currently there are 22, but the order permits Borden to increase or decrease this number at will. As long as total revenues exceed total variable costs, Borden is absolved of wrongdoing. Many, if not most, predation cases have alleged a smallish target market—a city or county area.[22] Yet Borden is now free to confront rivals in such areas with an absolute giveaway program, so long as sales in the remaining parts of the sales district bring total revenues above total variable costs. I would like to hear from some producers of reconstituted lemon juice about the vulnerability to a less-than-sales-district size price war.

Compounding this problem, the order appears to allow Borden to play a shell game when allocating costs to individual sales districts and time periods. Allocations can be made without prior FTC approval, and without any limitation as to frequency. The order says

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[22] Indeed, Borden's "Golden Crown Strategy" was aimed at specific metropolitan areas and geographic regions. 92 FTC at 727-728, 732-756.

costs may be allocated according to "identifiable factors that make allocations to a particular sales district proper", but gives virtually no guidance[23] on the precise method of allocation. I would welcome comments for corporate accountants on the feasibility of using such flexibility to hide predatory pricing.

Finally, the order is defective in a practical sense: it appears that compliance monitoring and enforcements will require *de novo* investigations and trial. The essential problem is that the order does not define "variable cost" with any specificity. A cost will qualify as variable if it is "avoidable" consistent with "prudent business practice." I fear that in assessing avoidability, our staff would have to look at market definition and market power in order to know if Borden's actions were prudent under the circumstances. Moreover, on costs which traditionally are seen as variable (such as advertising or labor) it would seem that the burden of proof has shifted; on Borden's mere say-so, our staff now must show that each element of each category of cost was not avoidable, rather than Borden's showing why the characterization does not apply. Since Borden has the most control over the evidence on point, it will be an uphill struggle for our compliance staff.

To the extent that Borden can argue that certain costs, although traditionally considered marginal, nonetheless cannot be avoided consistent with prudent business practices, the standard by which Borden will be judged could be less than actual marginal cost. It is ironic that Areeda and Turner instituted the search for a cost threshold from a desire to find an objective and workable standard for distinguishing between pricing above or below marginal cost, which they concluded is "the economically sound division between acceptable,

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[23] The exception is contained in provision A2, regarding certain costs of television advertising.

competitive behavior and 'below-cost' predation". P. Areeda and D. Turner, *supra* at 716. Today the Commission abandons the quest for objectivity and manageability and endorses a test which rests so much as Borden's subjective conclusions that even the relationship to marginal cost is attenuated.

Lastly, I am not as sanguine as the majority about the chances of this consent being declared devoid of precedential significance. Most consents are indeed *sui generis;* but this one, accompanied by a lengthy statement full of sweeping statements on the "correct" application of predation theory, seems destined to play a continuing jurisprudential role. We may be able to erase it from our institutional memory (although I doubt that companies seeking equity and parity will allow us to do so uncontested), but we can hardly dictate its use in private actions.

One further aspect of this matter concerns me apart from the actual merits of the settlement or the majority's theories on predatory pricing. What we have here is not a standard settlement. What we have here is a proposal, couched in terms of a settlement, to repudiate the Court of Appeal's decision affirming the 1978-Commission's final decision in order to allow the 1983-Commission to redecide the case. The Supreme Court is being asked to facilitate this change in the Commission's decision, not by rendering a decision on the merits, but by performing the purely administrative function of returning the matter to the agency's jurisdiction so that the agency can change its mind. Such an effort seriously distorts the proper relationship of a federal agency to the judiciary, and sets a highly visible precedent for any agency, any time it undergoes a change in administration or guiding principles, to petition the courts to reach backward in time to rewrite opinions long completed and to nullify independent judicial efforts long since expended.

The reality of the Commission's position is not that, since 1978, the law of predatory pricing has become clear; it has not. In any event the terms of the settlement do not conform to any previously expressed standards of law in the area. Rather, the composition of a federal agency has changed, and it now believes its view of predatory pricing is "better" than the one applied earlier.[24] Whether or not this is true, the Commission ought to be content to use its newer view of the law to guide its decision on current matters. By such a process, comment on older cases may be offered, new precedent issued, and the course of the law possibly shifted. To go beyond the bounds of this traditional power, however, is to disrupt the orderly process of jurisprudence—an expansionist view of this agency's role to which I do not subscribe. It is noteworthy, moreover, that this "better" view of the law had not surfaced at the Federal Trade Commission even as recently as February 1982, when, after briefing and argument by Commission attorneys, the Court of Appeals issued its affirmance of the 1978 FTC Opinion. Indeed, the Commission did not see fit to "educate" the Sixth Circuit about these new views even after it received the Court's "favorable" decision, and when that Court still could have modified its opinion or reheard the case *en banc*. Because the only purpose of the extension now requested is to permit the Commission to subsequently ask this Court to help it implement its agreement with Borden, I would urge that the request be denied.

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[24] If it were at all clear (1) that the Commission applied the wrong legal standard to this case in 1978, or (2) that the Court of Appeals in 1982 repeated or added to the alleged error in its affirmance of the Commission, (3) or that a "correct" standard applicable to predatory pricing had emerged judicially, or (4) that the Commission intended to apply any such judicially endorsed standard—I might be more sympathetic to the majority's position.

SEPARATE STATEMENT OF COMMISSIONER GEORGE W. DOUGLAS IN THE MATTER OF BORDEN, INC., DOCKET NO. 8978

I wholeheartedly concur with the majority statement in support of the revised order for the simple reason that it seeks to correct what has proven to be an egregiously bad order founded on a tortured economic treatment of advertising as an entry barrier, an erroneous concept of geographic price discrimination, and an undefined cost-based standard for predation. Indeed, of all the issues explored in the minority comments and in the majority's statement, the one point that stands clear is that none of the five Commissioners is satisfied with the original decision and order in the case.

First, in the Commission's original, 1978 order, Borden was prohibited from pricing its ReaLemon brand of reconstituted lemon juice "below its costs" or at "unreasonably low prices" (92 FTC 669 at 833). The language used was so vague and undefined ("costs" were not defined at all) that upon appeal the Sixth Circuit Court was able to read into the order a prohibition against Borden from pricing its product at any level that would cause its competitors to price below *their* average variable costs (674 F.2d 498, at 515-516).

Clearly, forcing Borden to erect a price umbrella over its competitors' heads in effect turns the economic theory of competitive markets on its head, to the extent that under the guise of promoting competition, the Commission would require market leaders to maintain prices above competitive levels so as to enable other firms successfully to market products perceived by consumers as interior.

Second, I am not at all persuaded by Commisioner Bailey's and Pertschuk's concerns that the cost standard referenced in the modified order is either vague or unenforceable; rather, in comparison with the original

order, it is a model of clarity, setting forth with as much direction as possible a cost based standard that comports with traditional economic concepts.

Third, I dispute Commissioner Pertschuk's claim that the revised order is "at odds with sound reasoning in recent court opinions." To the contrary, the revised order is well-attuned to the prevailing tendency of courts to employ more clearly delineated cost-based tests—especially variable cost standards—in evaluating pricing conduct. Indeed, to cling to the language and reasoning of the Commision's original order would confound sound economic principles, and would ignore the basic direction of judicial analysis over the past eight years. In my judgment the Federal Trade Commission should enforce the antitrust laws with the *best* economic evidence and insight available, whether found in court opinions or elsewhere. In this instance the Commission modifies an order which has become, through its own mistaken rationale, through its vagueness, and through its interpretation by the Sixth Circuit, paradoxically anticompetitive in itself.

[FR Doc. 83-5466 Filed 3-1-83; 10:21 am]

APPENDIX B

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK CONCERNING BORDEN, INC., DOCKET NO. 8978

APRIL 27, 1983

For the reasons I stated in my dissent of February 25, 1983, I continue to believe that this order should not be accepted and the Commission should seek denial of the petition for *certiorari*. The comments received support the proposition that the standards in the settlement are virtually unenforceable and that it represents a retreat from the current evolution in the law of predation.

I also dissent from the Commission's request that the Court vacate the judgment of the court of appeals. As the Solicitor General has previously argued, vacating the judgment of the court of appeals because of mootness, in a case where the Court would not otherwise have granted *certiorari*, is inappropriate.[1] The court of appeals has held that a lower court judgment should not be vacated, even where the case has become moot after judgment, if the mootness is the result of the appellant's voluntary actions.[2]

The Borden case was initiated by an administrative complaint in 1974. It was prosecuted by successive Commissions under the leadership of four Chairmen over three administrations, through the court of appeals' affirming of the Commission's opinion and order in 1982. It is now being undermined by the current administration, which is clearly hostile to predatory

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[1] See Brief for the United States, Velsicol Chemical Corp. v. U.S. (U.S. No. 77-900), March 1978 at 4-8, *cert. denied*, 435 U.S. 1070 (1979); *see also* International Ladies' Garment Workers' Union v. U.S., 439 U.S. 1070 (1979).

[2] Ringsby Truck Lines, Inc. v. Western Conference of Teamsters, 686 F.2d 720 (9th Cir. 1982).

pricing cases. Such reversals of lengthy litigation raise serious questions about the integrity and finality of adjudication.

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No. 82-328

IN THE

Supreme Court of the United States

OCTOBER 1982 TERM

BORDEN, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

REPLY OF PETITIONER TO THE BRIEF FOR THE FEDERAL TRADE COMMISSION SUGGESTING MOOTNESS

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In reply to the Brief for the Federal Trade Commission Suggesting Mootness, Petitioner, Borden, Inc., by its counsel, states that it agrees with the positions set forth by the Solicitor General in that Brief, and that the Court should therefore grant the petition for a writ of certiorari, vacate the judgment of the Court of Appeals for the Sixth Circuit, and remand the case to that court with instructions that it remand the case to the Federal Trade Commission for entry of the Order accepted by the Commission.

Respectfully submitted,

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